

SETTING THE RECORD STRAIGHT: THE EFFECTS OF THE EMPLOYMENT NON-DISCRIMINATION ACT OF 1997 ON THE FIRST AND FOURTEENTH AMENDMENT RIGHTS OF GAY AND LESBIAN PUBLIC SCHOOLTEACHERS

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I. INTRODUCTION

The Employment Non-Discrimination Act of 1997 ("ENDA"),¹ which was introduced in the 105th Congress on June 10, 1997, is intended to remedy workplace discrimination on the basis of sexual orientation.² The version of ENDA introduced in the 104th Congress narrowly missed passage in the Senate by one vote.³ During Senate floor debate in 1996, a number of Senators raised arguments in opposition to ENDA that mischaracterized the impact of the legislation on the rights of lesbian and gay public schoolteachers.⁴ These arguments continue to be raised today by ENDA's opponents.

Most of the concerns raised during Senate floor debate are rooted in the belief that gay and lesbian people are *per se* immoral and, therefore, are bad role models for youth. Certain Senators expressed concern that the presence of a gay or lesbian schoolteacher in the classroom somehow would harm students. Thus, they argued that ENDA should not be enacted because it would

prohibit public school authorities from categorically disqualifying gay people from serving as schoolteachers or in other positions in which they have an influence over children.

For example, Senator John Ashcroft (R-MO) suggested that the presence of a gay schoolteacher would disrupt the development of young men who may be "unsure about themselves when they are in transition . . . and [when] they move from boyhood to manhood."⁵ According to Senator Ashcroft, the years from adolescence into adulthood "are critical times when role models are very important."⁶ He said: "[I]n hiring schoolteachers, or camp counselors, or those who deal with young people, you never just hire a teacher. You are always hiring more than a teacher. You are hiring a role model."⁷

Referring to ENDA, Senator Ashcroft said, "I do not think [this] is the right signal to send to the next generation."⁸

Sharing Senator Ashcroft's sentiments, Senator Don Nickles (R-OK) suggested that ENDA would

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¹ S. 869, 105th Cong. (1997); H.R. 1858 105th Cong. (1997).

² See 140 CONG. REC. S7581 (daily ed. June 23, 1994) (statement of Sen. Kennedy). ENDA was first introduced in the 103rd Congress. S. 2238, 103rd Cong. (1994), H.R. 4636, 103rd Cong. (1994).

³ John E. Yang, *Senate Passes Bill Against Same-Sex Marriage*, WASH. POST, Sept. 11, 1996, at A1.

⁴ Although ENDA would cover teachers in public as well as non-religious, private schools, the Constitutional rights of public schoolteachers differ significantly from those of private schoolteachers. Because of length considerations, this article will address the rights of public schoolteachers alone. The term "schoolteacher" in this article is meant to encompass not only the traditional classroom instructors, but also coaches, guidance counselors, teacher's aides, and other school personnel directly responsible for the education and development of students.

⁵ 142 CONG. REC. S9986, S10,000 (daily ed. Sept. 6, 1996) (statement of Sen. Ashcroft).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

enable gay and lesbian schoolteachers to proselytize in the classroom, and that the bill would prohibit local school boards from controlling in-classroom speech. Equating homosexuality with promiscuity, he posited:

What about a school board making decisions. . . in Alabama where maybe this small community says we do not think we should have avowed open homosexual leaders, gay activists, as teachers in the fifth grade? . . . I would urge our colleagues to think about if school boards. . . really find promiscuous conduct unacceptable, and such persons engaging in such conduct not the right type of role models they would like to have for their young people they would be subject to suit under ENDA.⁹

Yet another Senator took the question of the regulation of gay schoolteachers' expression further, warning that ENDA would illegitimately prevent school administrators from disciplining gay and lesbian teachers on the basis of same-sex public displays of affection ("PDAs"):

[S]uppose a single male teacher, during nonschool hours and in public, holds hands, walks arm in arm with his girlfriend, and engages in some kissing. I can well understand if the school authorities do not find that public behavior a matter for discipline. Under this bill, however, these same school authorities could not take action against a male teacher who engages in the very same public actions I just mentioned, with another male. I think that forcing [a school board] to treat both situations the same, in terms of role models for schoolchildren and the other concerns parents and educators might have, is wrong.¹⁰

In arguing that school boards should have the power to discriminate against gay men and lesbians as *per se* bad role models, several Senators referred to the case of Jeffrey Bruton (a.k.a. "Ty Fox"), a married middle school teacher and coach in suburban Virginia who resigned and surrendered his teaching license after it was discovered that he led a double life as a gay pornographic video star.¹¹ Senator Nickles warned that if ENDA were passed and a school board sought to discharge a gay teacher on the grounds that he or she appeared in a pornographic film, "[t]hey can be sued, under this legislation, not only for compensatory damages, but [also] for punitive damages."¹²

This article discusses how these arguments mischaracterize ENDA's scope, overlook well-settled

constitutional principles delimiting the First and Fourteenth Amendment rights of public schoolteachers, and evidence a lack of understanding of the nature of homosexuality and the current state of affairs of lesbian and gay teachers in the public schools. In the first half of this article, I will describe ENDA, then analyze the history of the treatment of schoolteachers as moral exemplars. I will provide a brief history of the discrimination that lesbian and gay teachers face, showing how the Senators' opposition to gay and lesbian teachers on the basis of vague notions of morality is neither new nor rare, and will then discuss how sexual orientation is not a valid factor in determining whether an individual would make a good role model or schoolteacher. In particular, I will demonstrate how recent interpretations of the Fourteenth Amendment's due process and equal protection guarantees would prohibit school administrators from categorically excluding gay and lesbian people from teacher positions, as Senators Ashcroft and Nickles contemplate.

In the second half of this article, I will examine the Senators' assumptions concerning the effects of ENDA on the free speech rights of public schoolteachers, demonstrating particularly how ENDA would not affect the ability of school boards and school administrators to regulate the in-classroom speech of gay and lesbian teachers, including school officials' legitimate abilities to prohibit "proselytizing" and "activism" inside the classroom. I will also demonstrate how ENDA's opponents' contention that ENDA would prohibit school administrators from disciplining gay teachers for same-sex PDAs again begs the question of whether school administrators have that authority absent ENDA. The First Amendment's free expression guarantees, and relevant caselaw, suggest that they do not.

II. THE EMPLOYMENT NON-DISCRIMINATION ACT OF 1997

For the great majority of gay and lesbian Americans, no effective legal recourse exists against em-

⁹ 142 CONG. REC. S10,066 (daily ed. Sept. 9, 1996) (statement of Sen. Nickles).

¹⁰ 142 CONG. REC. S9986, S9993 (daily ed. Sept. 6, 1996) (statement of Sen. Hatch).

¹¹ See, e.g., 142 CONG. REC. S9986, S10,000 (daily ed. Sept., 6, 1996) (statement of Sen. Ashcroft); 142 CONG. REC.

S10129, S10132 (daily ed. Sept. 10, 1996) (statement of Sen. Hatch); 142 CONG. REC. S10,129, S10,135 (daily ed. Sept. 10, 1996) (statement of Sen. Nickles). See also *Loudon Teacher Quits Over Porn Video Role*, WASH. TIMES, July 27, 1996, at A11.

¹² 142 CONG. REC. S10129, S10134 (daily ed. Sept. 10, 1996) (statement of Sen. Nickles).

ployment discrimination based on sexual orientation. Current federal anti-discrimination law prohibits employment discrimination on the basis of race, religion, national origin, sex (gender), age, and disability,¹³ but not sexual orientation. Attempts to assert that sexual orientation discrimination constitutes sex discrimination proscribed by Title VII of the Civil Rights Act of 1964,¹⁴ the primary federal law prohibiting employment discrimination, have failed.¹⁵ Moreover, although eleven states and the District of Columbia, as well as more than 100 local jurisdictions, have enacted

legislation proscribing sexual orientation discrimination in employment,¹⁶ the rest of America offers no such protection.

Although the types of discrimination afflicting gay and lesbian Americans have evolved with changes in economic and social dynamics,¹⁷ it remains true that today the gay and lesbian community is among the most discriminated against minority groups in the nation. Not only do gay people suffer from rampant employment discrimination,¹⁸ they also face more life-threatening

¹³ Section 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1994), prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. Section 4(a) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 623(a) (1994), prohibits employment discrimination on the basis of age. Section 102 of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12112 (1994), prohibits employment discrimination on the basis of disability. Additional statutes prohibit discrimination by entities receiving federal funding. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(a) (1995), prohibits discrimination on the basis of race, color, and religion. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (1995), prohibits discrimination on the basis of disability by such entities. Section 303 of the Age Discrimination Act of 1975, 42 U.S.C. § 6102 (1995), prohibits discrimination on the basis of age by such entities. Section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (1995), prohibits discrimination based on sex in educational institutions that receive such funds.

¹⁴ 42 U.S.C. § 2000e-2(a) (prohibiting discrimination on the basis of race, color, religion, sex and national origin).

¹⁵ See, e.g., *Dillon v. Frank*, 58 Empl. Prac. Dec. (CCH) para. 41,332, at 70,107 (6th Cir. 1992) (ruling against postal worker who brought sexual orientation discrimination claim under Title VII. The court concluded that the postal worker's coworkers' actions were all directed at demeaning him solely because they disapproved vehemently of his alleged homosexuality. "These actions, although cruel, are not made illegal by Title VII."); *Williamson v. A.G. Edwards and Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (per curiam) ("Title VII does not prohibit discrimination against homosexuals."); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979) ("[W]e conclude that Title VII's prohibition of 'sex' discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality.") (footnote omitted) (following *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 664 (9th Cir. 1977)).

¹⁶ See CAL. LAB. CODE § 1102.1 (West Supp. 1997); CONN. GEN. STAT. ANN. §§ 46a-81(c) (West 1995); D.C. CODE §§ 1-2501 to 1-2557 (Michie 1991 and Supp. 1997); HAW. REV. STAT. ANN. § 378-2 (Michie Supp. 1996); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 1996); MINN. STAT. ANN. § 363.03 (West Supp. 1997); 1997 N.H. LAWS 108 (effective Jan. 1, 1998); N.J. STAT. ANN. § 10:5-12 (West 1993); R.I. GEN. LAWS §§ 11-24-2-11-24-2.2, 28-5-3, 28-5-5, 28-5-7 (1995 & Supp. 1996); VT. STAT. ANN. tit. 21, § 495 (Supp. 1997); WIS. STAT. ANN. § 111.36 (West 1997). All ten jurisdictions prohibit discrimination on the basis of sexual orientation in employment

and all but California extend this protection to housing. Minnesota and Wisconsin also outlaw sexual orientation discrimination in public and private education. In Maine, the effectiveness of a non-discrimination statute prohibiting sexual orientation discrimination in employment, housing, and public accommodations that was enacted in May 1997 was put on hold pending a successful February 10, 1998 referendum which repealed the law. See 1997 ME. LAWS 205; see also *Maine's Gay-Rights Law Loses Court Fight*, BOSTON GLOBE, Nov. 23, 1997, at B5; *Ballot Sites Added in Gay-Rights Vote*, BOSTON GLOBE, Jan. 4, 1998, at B3; Carey Goldberg, *Maine Voters Repeal Law Banning Gay Bias*, N.Y. TIMES, Feb. 12, 1998, at A1, A33. For information on local jurisdictions that afford protection against discrimination based on sexual orientation, see Human Rights Campaign, *State, Cities and Counties Which Prohibit Discrimination Based on Sexual Orientation* (visited Jan. 27, 1998) <<http://www.hrc.org/issues/workplac/nd/ndjuris.html>>; Note, *Constitutional Limits on Anti-Gay-Rights Initiatives*, 106 HARV. L.R. 1905, 1923-25 (1993); William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 HOFSTRA L.R. 817, 925-28, 970 (1997) (providing numerous examples of anti-discrimination protections afforded by local jurisdictions).

¹⁷ See JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA*, 226-27, 288 (1988); Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1564-67 (1993); see also *Developments in the Law—Sexual Orientation and the Law*, HARV. L. REV. 1508 (1989) (discussing the history of discrimination against gay and lesbian Americans in public and private employment).

¹⁸ Twenty surveys conducted across the nation between 1980 and 1991 demonstrated that between 16 and 44% of gay men and lesbians had experienced workplace discrimination. See *Employment Discrimination on the Basis of Sexual Orientation: Hearings on S. 2238 Before the Senate Comm. on Labor and Human Resources*, 103d Cong., 2d Sess. 70 (1994) (statement of Anthony P. Carnevale, Chair, National Commission for Employment Policy); see also *The Employment Non-Discrimination Act: Hearing on H.R. 1863 Before the Subcomm. on Gov't Programs of the House Comm. on Small Bus.*, 104th Cong. 181-228 (1996) (statement of Chai R. Feldblum, Associate Professor of Law, Georgetown University Law Center, Appendix I (Summary of Reported Sexual Orientation Cases Before Federal and State Courts), Appendix II (Tabulation of Complaints Filed in Six States with Sexual Orientation Laws as of 1994) and Appendix III (Documented Cases of Job Discrimination Based on Sexual Orientation, Human Rights Campaign, Monograph, 1995)).

forms of bias, such as violent hate crimes.¹⁹

Patterned after Title VII, ENDA provides that a "covered entity" cannot, with respect to employment or an employment opportunity, subject an individual to different standards or treatment, or otherwise discriminate against the individual, on the basis of the individual's real or perceived sexual orientation or that of a person with whom the individual is believed to associate.²⁰

The term "covered entity" includes most federal and state employers²¹ as well as private employers. Private employers that are covered are those entities "engaged in an industry affecting commerce," as defined in Section 701(h) of the Civil Rights Act of 1964,²² that have 15 or more employees.²³ ENDA does not apply to the armed forces²⁴ nor to religious organizations, except regarding employment in a position whose duties are dedicated solely to generating unrelated business income subject to Federal taxation.²⁵ Moreover, ENDA would not apply to the provision of employee spousal benefits,²⁶ explicitly prohibits quotas or any preferential treatment on the basis of sexual orientation,²⁷ prohibits the Equal Employment Opportunity Commission from collecting statistics

on sexual orientation from covered entities, and affirmatively disallows disparate impact claims based on a *prima facie* violation of the statute.²⁸

ENDA has earned widescale support. As of August 28, 1997, ENDA had thirty-five Senate co-sponsors and 148 House co-sponsors.²⁹ President Clinton has endorsed ENDA and has committed to sign it into law if passed by Congress.³⁰ Dozens of major corporations including Apple Computer, AT&T, Bell Atlantic, Bethlehem Steel, Eastman Kodak, Honeywell, Merrill Lynch, Microsoft, Quaker Oats, RJR Nabisco, and Xerox have endorsed the bill for passage.³¹ A large number of church groups and non-profit organizations also have endorsed ENDA.³² Major civil rights figures, such as Coretta Scott King, have endorsed ENDA,³³ as has former conservative Republican Senator Barry Goldwater, who reasoned that "[e]mployment discrimination based on sexual orientation is a real problem in our society. From coast to coast and throughout the heartland, regular hardworking Americans are being denied the right to roll up their sleeves and earn a living. That is just plain wrong."³⁴

¹⁹ See HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN 7 (Gregory M. Herek & Kevin T. Berrill eds., 1992) (noting that gay people appear to be one of the most frequent victims of hate crimes); see also U.S. DEP'T OF JUST., FED'L BUREAU OF INVESTIGATION, HATE CRIME STATISTICS 1996 7 tbl.1 (Jan. 8, 1998) (stating that the FBI received reports of 1,016 crimes in 1996 targeting people because of their sexual orientation, representing 11.5 percent of the total 8,759 bias-motivated incidents reported to the FBI for that period. Following a 1993 study on hate crimes, the Los Angeles County Commission on Human Relations reported that in 1993 gay men had replaced African Americans as the leading target of hate crimes, having been targeted in 27 percent of the 783 hate crimes documented by law enforcement agencies and community organizations. Errol A. Cockfield, Jr., *Crimes of Bias*, L.A. TIMES, Mar. 30, 1995, at B1.

²⁰ See ENDA, S. 869 § 4, H.R. 1858 § 4.

²¹ See *id.* § 3 (including government employers encompassed by section 717(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(a), section 302(a)(1) of the Government Employee Rights Act of 1991, 2 U.S.C. § 1202(1), or the Congressional Accountability Act of 1995, 2 U.S.C.A. § 1301 (West 1997).

²² 42 U.S.C. § 2000(e)(h) (1994).

²³ See Employment Non-Discrimination Act of 1997, S. 869 § 3(3).

²⁴ See *id.* § 10(a)(1).

²⁵ See *id.* § 9.

²⁶ See *id.* § 6.

²⁷ See *id.* § 8.

²⁸ See *id.* § 7.

²⁹ See Human Rights Campaign, *105th Congress Current Cosponsors of the Employment Non-Discrimination Act* (visited Jan. 27, 1998) <<http://www.hrc.org/issues/leg/enda/endacs.html>>.

³⁰ See Clinton Backs Bill to Bar Job Bias Against Gays, CHI. TRIB., Oct. 21, 1995, at 8N.

³¹ See Human Rights Campaign, *Corporations Endorsing the Employment Non-discrimination Act (ENDA)* (visited Jan. 27, 1998) <<http://www.hrc.org/issues/workplac/enda/endacorp.html>>.

³² The American Jewish Committee, the Episcopal Church, the Evangelical Lutheran Church, the Presbyterian Church (USA), the Union of American Hebrew Congregations, and the United Methodist Church, among others, have endorsed ENDA. See Human Rights Campaign, *Churches and Religious Organizations Endorsing the Employment Non-Discrimination Act (ENDA)* (visited Jan. 27, 1998) <<http://www.hrc.org/issues/leg/enda/endarel.html>>. The American Bar Association, the American Nurses Association, the American Psychological Association, the AFL-CIO, the National Women's Law Center, and People For the American Way, among others, have endorsed ENDA. See Human Rights Campaign, *Organizations Endorsing the Employment Non-Discrimination Act (ENDA)* (visited Jan. 27, 1998) <<http://www.hrc.org/issues/leg/enda/endaorg.html>>.

³³ See 142 CONG. REC. S9987 (daily ed. Sept. 6, 1996) (statement of Sen. Kennedy).

³⁴ *Id.*

III. SEXUAL ORIENTATION IS NOT DETERMINATIVE OF WHETHER A TEACHER IS A GOOD ROLE MODEL OR A GOOD EDUCATOR

Those Senators who opposed ENDA were correct in asserting that public schoolteachers are selected for characteristics that render them good educators as well as good role models for students. They are incorrect, however, in suggesting that gay and lesbian people are a bad influence on youth and thus should be excluded categorically from teaching positions. Such a suggestion belies the nature of homosexuality and the successful, longstanding presence of lesbian and gay teachers in the nation's schools.

A. Schoolteachers as Moral Exemplars

As a consequence of their responsibility for the intellectual and moral development of children, schoolteachers are held to a high code of personal and professional conduct.³⁵ Courts have accorded parents the right to expect that those who are entrusted with the education of their children possess innate virtue and morality, as defined by the attitudes and sensibilities of the community.³⁶ In 1790, Noah Webster contended that "the only practicable method to reform mankind, is to begin with children; to banish, if possible, from their company, every low bred, drunken, immoral character The great art of correcting mankind therefore, consists in prepossessing the mind with good principles."³⁷

In its 1952 *Adler v. Board of Education*³⁸ decision, the Supreme Court echoed Webster's sentiments:

"A teacher works in a sensitive area in a schoolroom. . . . That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the school as part of ordered society, cannot be doubted."³⁹

Because standards for the selection and governance of teachers traditionally are set by local elected officials, these standards more often than not reflect the social mores of the local community. It is not surprising, therefore, that at times the conduct proscribed by local school administrators has included public smoking, drinking, dancing, theater going, loitering, and even automobile rides on weekday nights and leaving town without the school board chairman's permission.⁴⁰

Having local politicians prescribe standards for the selection and promotion of teachers has ratified unjust social biases, under the guise of vague iterations of morality, as criteria for identifying good teachers. For example, individuals perceived to be Communists,⁴¹ spouses in mixed-race marriages,⁴² and pregnant women⁴³ at one time were excluded from schoolteacher positions because the local community considered them immoral or a bad influence on children. The practice of applying majoritarian community prejudices in schoolteacher employment decisions is by no means a uniquely American phenomenon. In the mid-1930s, Jewish public teachers in Germany were fired from their jobs because Jews were perceived as *per se* immoral and poor role models for children.⁴⁴

Because gays and lesbians throughout history

³⁵ See *Pettit v. State Bd. of Educ.*, 513 P.2d 889, 894 (Cal. 1973) (en banc); *Board of Trustees v. Hartman*, 55 Cal. Rep. 144, 148 (Cal. Ct. App. 1966); *Governing Bd. of Mountain View Sch. Dist. v. Metcalf*, 36 Cal. Rep. 724, 727 (Cal. Ct. App. 1974).

³⁶ See, e.g., *Tingley v. Vaughn*, 17 Ill. App. 347, 350-51 (1885); *Schwer's Appeal*, 36 Pa. D. & C. 531, 533 (1939) (finding that a teacher who failed to "command the respect nor good will of the community" could be deemed incompetent); see also *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (invalidating statute requiring public university professors to sign national loyalty pledge).

³⁷ NOAH WEBSTER, A COLLECTION OF ESSAYS AND FUGITIVE WRITINGS (1790) quoted in KAREN M. HARBECK, GAY AND LESBIAN EDUCATORS: PERSONAL FREEDOMS, PUBLIC CONSTRAINTS, 113-14 (1997).

³⁸ 342 U.S. 485 *aff'd per curiam sub nom.*, *L'Hommedieu v. Board of Regents*, 342 U.S. 951 (1952), and *overruled in part* by *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

³⁹ *Id.* at 493.

⁴⁰ See DAVID RUBIN, THE RIGHTS OF TEACHERS 108-09 (1971).

⁴¹ See HARBECK, *supra* note 37, at 179-86; see also *Beilan v. Board of Pub. Education*, 357 U.S. 399 (1958) (holding that public schoolteacher's discharge did not violate the Fourteenth Amendment's Due Process Clause where teacher refused to answer school superintendent's question concerning teacher's Communist party affiliation and such refusal constituted "incompetency" within Pennsylvania public school code provision that made incompetency a ground for discharge).

⁴² See, e.g., *Clark v. Louisa County Sch. Bd.*, 472 F. Supp. 321 (E.D. Va. 1979).

⁴³ See, e.g., *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

⁴⁴ ERWIN J. HAEBERLE, *Swastika, Pink Triangle and Yellow Star: The Destruction of Sexology and the Persecution of Homosexuals in Nazi Germany*, in HIDDEN FROM HISTORY: RECLAIMING

have been discriminated against on the basis of the majoritarian view that homosexuality is *per se* immoral,⁴⁵ it is not surprising that lesbian and gay teachers have been discriminated against in schoolteacher positions. As described in the following section, the emergence of organized gay communities and a gay "identity" over the past half century has mobilized anti-gay forces that have rallied against equal rights for lesbians and gay men. Most often, these political attacks—similar to those used in the 1996 ENDA floor debates—have relied upon distorted images of lesbians and gays in the politically charged public school setting as a means to quickly incite public opposition to ENDA-like equal rights legislation.

B. A Brief History of the Treatment of Gay and Lesbian Teachers As *Per Se* Immoral

1. *The Emergence and Vilification of a Gay Identity*

In the United States, government-sanctioned and overt discrimination against gay men and lesbians became most prevalent following the emergence of gay and lesbian communities and a distinct "gay identity."⁴⁶ Whereas society had long since treated *homosexuality* as a vilified *behavior*, the emergence of a gay identity acquainted the world with *homosexuals*—individuals who comprised a culture that evidenced characteristics and motivations unrelated to particular sexual practices.⁴⁷

The birth of gay and lesbian communities also gave rise to opportunities for the government (in-

cluding law enforcement officers) to single-out and harass gay people, thereby setting the norm for the treatment of homosexuals by private employers, landlords, and other private actors.⁴⁸ This governmental repression of the emerging gay and lesbian identity originated at the highest levels. For example, in 1950, the Senate Investigations Subcommittee was instructed "to make an investigation into the employment by the Government of homosexuals and other sex perverts," and concluded that homosexuals were unqualified for government employment because they "lack emotional stability of normal persons."⁴⁹

Such blatant acts of bigotry against gay people provoked lesbians and gay men to become politically organized in order to wrest equal rights from their local and state governments.⁵⁰ At times, nascent gay political organizations were successful in advocating passage of gay civil rights ordinances.⁵¹ Such hard-won civil rights protections, however, came at a price.

2. *The Anti-Gay Backlash*

The passage of early gay and lesbian civil rights ordinances engendered a backlash from conservative activists who rallied support for the repeal of these laws by advancing arguments concerning gay and lesbian teachers similar to those articulated by those Senators who vocally opposed ENDA. In the late 1970s, then-popular entertainer Anita Bryant sought to rid Miami schools of

THE GAY AND LESBIAN PAST 370 (Martin B. Duberman et al. eds., 1990).

⁴⁵ See John D'Emilio, *Making and Unmaking Minorities: The Tensions Between Gay Politics and History*, 14 N.Y.U. REV. L. & SOC. CHANGE 915, 917 (1986); Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073, 1087 (1988); see generally JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY* (1980).

⁴⁶ See Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237, 272 (1996) (citing D'EMILIO & FREEDMAN, *supra* note 17, at 226-27.) See also JOHN D'EMILIO, *Capitalism and Gay Identity*, in *SEXUAL ORIENTATION AND THE LAW* 46, 47 (William B. Rubenstein, ed., 2d ed. 1997) (tracing the emergence of a gay identity). D'Emilio disagrees with the notion that gay people have existed forever. He posits that gay men and lesbians: are a product of history. . . . [I]t has been the historical development of capitalism—more specifically, its free labor system—that has allowed large numbers of men and women in the late twentieth century to call themselves

gay, to see themselves as part of a community of similar men and women, and to organize politically on the basis of that identity.

Id.

⁴⁷ See JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970* 9-39 (1983) (positing that the urbanization of the United States led to the creation of lesbian and gay enclaves in major cities that in turn facilitated the development of lesbian and gay minority communities and identities).

⁴⁸ Patricia Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1565 (1993).

⁴⁹ *Id.* at 1565-66 (quoting SUBCOMM. ON INVESTIGATIONS OF THE COMM. ON EXPENDITURE IN THE EXECUTIVE DEP'TS., *EMPLOYMENT OF HOMOSEXUALS AND OTHER SEX PERVERTS IN GOVERNMENT*, INTERIM REPORT, S. DOC. NO. 241, 81st Cong., 2d Sess. 4 (1950)).

⁵⁰ See *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1515-16 (1989).

⁵¹ See *State and Local Laws*, in RUBENSTEIN, *supra* note 46, at 468-73.

"deviant" influences by laboring successfully to repeal a Dade County, Florida ordinance supporting gay and lesbian housing and employment protections.⁵² Contending that "I'd rather my child be dead than be a homosexual,"⁵³ Bryant crusaded against the ordinance with zeal, advocating that "Homosexuality is a sin, and if homosexuals were given carte blanche to glamorize their 'deviant lifestyle' in Miami-area classrooms, the American family would be destroyed and the American way of life would disappear."⁵⁴

Bryant contended that in Los Angeles alone, 30,000 students under the age of 12 were being "recruited and sexually abused by homosexuals."⁵⁵ Bryant invoked the "role model" argument much in the same way that the argument was used during the 1996 ENDA Senate floor debate: "Unless repealed, the ordinance will allow homosexuals . . . to provide 'role models' for the impressionable This recruitment of our children is absolutely necessary for the survival and growth of homosexuality—for since homosexuals cannot reproduce, they *must* recruit, *must* freshen their ranks."⁵⁶

In the end, Bryant's efforts, although perceived as irrational by many, prevailed. On June 7, 1977, Dade County voters repealed the housing and employment anti-discrimination ordinance by a vote

of 69 percent to 31 percent with over 30,000 citizens casting their votes.⁵⁷

Bryant's formula was replicated in other states, such as Minnesota, Kansas, Oklahoma, and Oregon.⁵⁸ In California, a ballot referendum known as the Briggs Initiative or "Proposition 6," introduced in June 1977 by State Senator John Briggs (R-Fullerton) sought to "rid schools of homosexual teachers"⁵⁹ by permitting the firing of any public school employee who engaged in "advocating, soliciting, imposing, encouraging or promoting [] private or public homosexual activity."⁶⁰ The Briggs Initiative was defeated in California on November 7, 1978.⁶¹

In Oklahoma, Anita Bryant reprised her earlier success in Florida by persuading Oklahoma legislators to have the Briggs Initiative language enacted (as what was referred to as "Helm's Bill" after its sponsor, Oklahoma State Senator Mary Helm) on April 6, 1978. The Oklahoma statutory provision, however, was later overturned by the 10th Circuit Court of Appeals as overbroad because it punished protected, out-of-classroom speech.⁶² Similar attempts to pass initiatives to repeal employment non-discrimination statutes protecting gay and lesbian employees persist to this day.⁶³

⁵² See Bill Peterson, *Gay Rights Law Loses 2-1 in Miami*, WASH. POST, June 8, 1977, at A1. Civil rights activists still have not been able to have this ordinance re-enacted.

⁵³ Millie Ball, *I'd Rather My Child Be Dead Than Homo*, THE TIMES-PIYAYUNE, June 19, 1977, at 3.

⁵⁴ Ken Kelley, "Cruising with Anita," *Playboy* (May 1978), at 75.

⁵⁵ Harbeck, *supra* note 37, at 49 (quoting Kay Zahasky, *Anita Bryant: Exclusive Interview*, TODAY'S STUDENT, Feb. 6, 1978). Bryant warned that the "'national goals' of the 'homosexual conspiracy' were to overturn age of consent laws and acquire 'special legal privileges'" in order to recruit schoolchildren. *Id.* (quoting Zahasky, *supra*).

⁵⁶ ANITA BRYANT, THE ANITA BRYANT STORY 146 (1977) reprinted in RUBENSTEIN, *supra* note 46, at 475, 476.

⁵⁷ See Peterson, *supra* note 52, at A1. That same year, *Good Housekeeping* magazine named Anita Bryant the "most popular woman in America," based on a national readers poll. Harbeck, *supra* note 37, at 53 (quoting Zahasky, *supra* note 55).

⁵⁸ Kristina Campbell & Lyn Stoesen, *19 Years of Ballot Battles*, WASH. BLADE, Nov. 12, 1993, at 14; see also Note, *Constitutional Limits on Anti-Gay Rights Initiatives*, 106 HARV. L. REV. 1905, 1908 (1993). Anita Bryant reprised her earlier success in Florida by persuading Oklahoma legislators to have the Briggs Initiative language enacted on April 6, 1978. The Oklahoma statutory provision, however, was later overturned by the 10th Circuit as overbroad because it punished protected, out-of-classroom speech. See National Gay Task Force

v. Board of Educ., 729 F.2d 1270, 1274 (10th Cir. 1984), *aff'd* 470 U.S. 903 (1985) (per curiam).

⁵⁹ See The Pride Legal Defense Fund, *Proposition Six*, (1978), cited in HARBECK, *supra* note 37, at 63.

⁶⁰ Nan D. Hunter, *Speech, Identity and Equality*, 79 VA. L. REV. 1695, 1703 (1993) (citing California Proposition 6, § 3(b)(2) (1978)). The Briggs Initiative would have amended the California State Education Code with language including the following:

As a result of continued close and prolonged contact with schoolchildren, a teacher, teacher's aide, school administrator or counselor becomes a role model whose words, behavior and actions are likely to be emulated by students coming under his or her care. . . . For these reasons the state finds a compelling interest in refusing to employ and in terminating the employment of a schoolteacher, a teacher's aide, a school administrator or a counselor, subject to reasonable restrictions and qualifications, who engages in public homosexual activity and/or public homosexual conduct. . . .

California Proposition 6, § 1 (1978), reprinted in HARBECK, *supra* note 37, at app. B.

⁶¹ See Andrea Pearldaughter, *Employment Discrimination Against Lesbians: Municipal Ordinances and Other Remedies*, 8 WOMEN'S L.F. 538, 553 (1979), cited in HARBECK, *supra* note 37, at 81.

⁶² See *National Gay Task Force*, 729 F.2d at 1274.

⁶³ In 1992, citizens of Colorado passed a referendum that resulted in "Amendment 2" to the Colorado Constitu-

3. *Gaylord v. Tacoma School District No. 10*

The impact of anti-gay activism in the 1970's did not spare the courts. Like some legislatures, a number of courts succumbed to majoritarian prejudices by finding that gay and lesbian people are *per se* immoral and thus unqualified to hold teaching jobs. In 1977, at the height of Anita Bryant's crusade against gay and lesbian equal rights, the Supreme Court of Washington, in *Gaylord v. Tacoma School District No. 10*,⁶⁴ upheld the dismissal of James Gaylord, a well-respected and experienced public high school teacher, solely on the grounds that he admitted he was gay.⁶⁵ The school board's written policies required holders of teaching certificates to be persons "of good moral character," and provided that "immorality" is sufficient grounds for discharge.⁶⁶ A student who had sought Gaylord's advice on an academic matter told the school principal that, from his discussion, he believed that Gaylord was gay. When the principal conferred with Gaylord, Gaylord confirmed his homosexuality. Less than one month later, Gaylord was notified that the Tacoma School Board had probable cause for his discharge due to his homosexuality, and a short time after that, he was discharged.⁶⁷

In equating homosexuality with immorality, the court resorted to quoting the *New Catholic Encyclopedia*, noting that it characterizes homosexuality as immoral.⁶⁸ The court also found dispositive that "[h]omosexuality is widely condemned as immoral and was so condemned as immoral during biblical times."⁶⁹ Having concluded that homosexuality is inherently immoral, the court held,

tion, which prohibited government entities from enforcing or enacting any action that would protect individuals from discrimination on the basis of sexual orientation. COLO. CONST. art. II, § 30(b). In 1993, Portsmouth, New Hampshire voters barred "protected" legal status for gay men and lesbians, and voters in Cincinnati, Ohio endorsed an initiative to rescind and ban statutory protections for gay and lesbian citizens, patterned after the Colorado Amendment 2 language. See generally *Equality Found. v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995), vacated and remanded for further consideration in light of *Romer v. Evans*, 116 S. Ct. 2519 (1996) (mem.); *The 1993 Elections: Propositions*, N.Y. TIMES, Nov. 3, 1993, at A24. All of these statutes were invalidated by the Supreme Court's *Romer v. Evans* decision. 116 S. Ct. 1620 (1996). In *Romer*, the Supreme Court held that Amendment 2 to the Colorado constitution failed to further a proper legislative end and violated the Equal Protection clause insofar as it prohibited an entire class of citizens, i.e., gays and lesbians, from seeking the aid of their government to redress wrongs. See *Romer*, 116 S. Ct. at 1629.

without any actual evidence, that Gaylord's remaining on the school's faculty would have been unacceptably disruptive.⁷⁰

C. Gays and Lesbians Are Just As Likely As Heterosexuals To Serve As Excellent Teachers and Role Models

1. *Dispelling the "Recruitment" and "Molestation" Myths*

Implicit in the views of the *Gaylord* court and the anti-gay activists who backed the Briggs and Dade County initiatives was the misconception that the very presence of these gay men and lesbians as authority figures in the lives of students might in some way have the effect of "recruiting" these young people "into" homosexuality. Also implicit in these views is the belief that gay and lesbian people have a tendency to be pedophiles and thus must be kept away from children. The Senators' statements in opposition to ENDA cited above quite clearly echo these longstanding sentiments.

a. *The Nature of Sexual Orientation*

The notion that gay people recruit and proselytize, or even worse, molest youth more often than heterosexuals is squarely disproved by hard statistics and by the evolving social and scientific understanding concerning the nature of homosexuality. Gay people are no more likely—and actually may be less likely—to molest children than are heterosexuals.⁷¹ Moreover, children exposed to

⁶⁴ 559 P.2d 1340 (Wash. 1977) (en banc). See also *Rowland v. Mad River Local Sch. Dist.*, 730 F.2d 444, 451 (6th Cir. 1984) (upholding dismissal of public school counselor for mentioning her lesbianism to colleague at school).

⁶⁵ *Gaylord*, 559 P.2d at 1347.

⁶⁶ See *id.* at 1342.

⁶⁷ See *id.*

⁶⁸ See *id.* at 1343.

⁶⁹ *Id.* at 1345.

⁷⁰ See *id.* at 1347.

⁷¹ See Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 L. & SEXUALITY 133, 152-56 (1991); Carole Jenny, et al., *Are Children at Risk for Sexual Abuse by Homosexuals?*, 94 PEDIATRICS 41, 41 (1994) (finding that records in a child sexual abuse clinic revealed that children were far more likely to be abused by the heterosexual partner of a close relative than by a gay or lesbian person); Judd Marmor, *Clinical Aspects of Male Homosexuality*, in *HOMOSEXUAL BEHAVIOR: A MODERN REAPPRAISAL*, 271 (Judd Marmor ed. 1980).

gay and lesbian role models are no more predisposed to "becoming" homosexuals than children exposed to few or no gay and lesbian influences. One researcher, in fact, discovered that of thirty-seven children raised by same-sex parents, thirty-six of the children grew up to be heterosexual.⁷² If sexual orientation could "rub off" as easily as some of ENDA's Senate opponents suggest it does, then presumably all children of heterosexuals would grow up to be heterosexuals. Ronald Reagan made an eloquent attempt to dispel this myth in a public statement opposing California's Briggs Initiative in 1978:

As to the role model argument, a woman writing to the editor of a Southern California newspaper said it all: 'If teachers had such power over children, I would have been a nun years ago.' Whatever else it is, homosexuality is not a contagious disease like the measles. Prevailing scientific opinion is that an individual's sexuality is determined at a very early age and that a child's teachers do not really influence this.⁷³

Although the scientific community has not reached agreement on whether homosexuality is a genetic trait, it has reached a broadbased consensus on the proposition that a person's sexual orientation, whether heterosexual or homosexual, is fixed and generally is not subject to conscious change.⁷⁴ No doubt, this growing understanding of the nature of homosexuality was precipitated by gay and lesbian people asserting

their identities. Now viewing homosexuality as an innate characteristic, the mainstream scientific community has revoked its traditional formulation of homosexuality as disease.⁷⁵

Facing the mounting scientific and social pressures, churches have begun to moderate their views on homosexuality. Perhaps the most striking example of this trend is the Roman Catholic Church, which despite a history of deeming homosexuals as *per se* immoral, has begun to manifest a more conciliatory approach to the notion that gay and lesbian people are entitled to full religious, political, social, and familial enfranchisement. In a remarkable pastoral message from the National Conference of Catholic Bishops U.S. Catholic Conference, the American Roman Catholic Church leadership urged parents to love and not reject their gay and lesbian children, calling sexual orientation "a fundamental dimension of one's personality."⁷⁶ In perhaps its most groundbreaking statement, the U.S. Bishops clarified that homosexual orientation alone cannot be considered immoral: "[h]omosexual orientation is experienced as a given, not as something freely chosen. By itself, therefore, a homosexual orientation cannot be considered sinful, for morality presumes the freedom to choose."⁷⁷

Although weakened by its internal contradic-

⁷² See Richard Green, M.D., *Sexual Identity of 37 Children Raised By Homosexual or Transsexual Parents*, 135:6 AM. J. PSYCHIATRY 692-697 (June 1978); see also Jeanne J. Speizer, *Role Models, Mentors, and Sponsors: The Elusive Concepts*, 6 (4) SIGNS: J. WOMEN IN CULTURE & SOC'Y 692 (1981); see generally Richard Green, M.D., *THE "SISY BOY SYNDROME" AND THE DEVELOPMENT OF HOMOSEXUALITY* (1987).

⁷³ RONNIE DUGGER, ON REAGAN, THE MAN AND HIS PRESIDENCY 264, 559 n.3 (1983).

⁷⁴ See Chandler Burr, *Homosexuality and Biology*, ATLANTIC MONTHLY, March 1993, at 47 (summarizing scientific developments identifying possible genetic basis for homosexual orientation); Gary Ramafedi, *Homosexual Youth: A Challenge to Contemporary Society*, 258 JAMA 222-23 (1987) (reporting that most studies find sexual orientation well-established by early childhood); see also Eli Coleman, *Changing Approaches to the Treatment of Homosexuality in HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL, AND BIOLOGICAL ISSUES*, 81-88 (William Paul, et al. eds. 1982); ALAN P. BELL, *SEXUAL PREFERENCE—ITS DEVELOPMENT IN MEN AND WOMEN*, 166-67, 211, 222 (1981); N. McConaghy, *Is a Homosexual Orientation Irreversible?*, 129 BRIT. J. PSYCHIATRY 556, 563 (1976); Frank X. Acosta, *Etiology and Treatment of Homosexuality: A Review*, 4 ARCHIVES OF SEXUAL BEHAV. 9, 23-24 (1975); see generally C.A. TRIPP, *THE HOMOSEXUAL MATRIX* (1975); Michael W. Ross & Olli W. Ståhlström, *Exorcism as Psychiatric Treatment: A Homosexual Case Study*, 8 ARCHIVES OF SEXUAL BEHAV. 379, 379 (1979).

⁷⁵ In 1973, the American Psychiatric Association re-

moved homosexuality from the category of sociopathic personality disturbances in the DIAGNOSTIC AND STATISTICAL MANUAL OF PSYCHIATRIC DISORDERS (DSM-II). See RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* 129, 137 (1981). In 1985, the American Psychological Association resolved that homosexual orientation "implies no impairment in judgment, stability, reliability or general social or vocational capabilities." American Psychological Association, Resolution (Jan. 1985), excerpted in *Jantz v. Muci*, 759 F. Supp. 1543, 1548 (D. Kan. 1991), *rev'd on other grounds* 976 F.2d 623 (10th Cir. 1992).

⁷⁶ *Always Our Children: Pastoral Message to Parents of Homosexual Children and Suggestions for Pastoral Ministers*, National Conference of Catholic Bishops Committee on Marriage and Family, Sept. 10, 1997 [hereinafter *Pastoral Message*] reprinted in 27 ORIGINS, CNS DOCUMENTARY SERVICE 285 (Oct. 9, 1997). See also Caryl Murphy, *U.S. Catholic Bishops Urge Acceptance of Gay Orientation*, WASH. POST, Oct. 1, 1997, at A1, A18.

⁷⁷ *Pastoral Message*, *supra* note 76, at 289. Although a welcome and encouraging sign of the Catholic Church's increased understanding of the plight of gay and lesbian Catholics, the Bishops' Letter advances a constricted existence for gay and lesbian Catholics who wish to live within the Church's mandates. While the Bishops clarify that a homosexual orientation alone cannot be considered sinful and immoral, they continue to assert that homosexual *contact* is immoral. See *id.* at 290. Thus, the only way for a gay or lesbian

tion,⁷⁸ the Church's position undercuts the view that gay and lesbian people are *per se* immoral and, thus, a bad influence on children. In light of the new scientific and religious understandings concerning the origins and nature of homosexuality, the attitudes and beliefs advanced by ENDA's opponents in the Senate concerning ENDA and teachers appear even more outdated and anachronistic.

2. Role Models for Gay and Lesbian Youth

Not only are the Senators' comments based on outdated perspectives on the nature of homosexuality, they also incorrectly presuppose that there are no gay or lesbian schoolchildren. Studies have shown that sexual orientation is set in very early childhood, perhaps even before birth.⁷⁹ Gay and lesbian youth often face extreme difficulties growing up. Unlike children in religious, racial, or ethnic minority communities who are nurtured and prepared by their families to face society's prejudices and injustices, gay youth typically grow up isolated in school, family, and community environments that, more often than not, ostracize and condemn gay people. The absence of positive gay and lesbian role models further isolates these gay youths and aggravates their already tormented existences.

Catholic to comply with the Church's moral code would be to lead a chaste existence.

⁷⁸ Although the Bishops acknowledge that gay and lesbian people do not choose to be homosexual and thus cannot be adjudged as *per se* immoral, they persist in deeming homosexual sexuality (i.e., sexual activity by gay or lesbian Catholics) as immoral and advocate a "chaste life" for gay and lesbian Catholics. See *id.* at 290. In making this strained status/conduct distinction, the Bishops fail to explain why homosexual sexual orientation is not immoral in terms of status and identity, but somehow becomes immoral when acted upon.

⁷⁹ See, e.g., Gary Remafedi, *Homosexual Youth: A Challenge to Contemporary Society*, 258 JAMA 222, 223 (1987) (claiming that most studies conclude that sexual orientation is well-established by early childhood).

⁸⁰ Quoted in Katherine A. O'Hanlan, et al., *Homophobia is a Health Hazard*, USA TODAY MAG., Nov. 1996, at 26, 26-27. See also A. Damien Martin & Emery S. Hetrick, *The Stigmatization of the Gay and Lesbian Adolescent*, 15 J. HOMOSEXUALITY 163, 167 (1988) ("There is little or no opportunity for the homosexually oriented adolescent to discover what it means to be homosexual. Therefore, they cannot plan or sometimes even conceive of a future for themselves.").

⁸¹ Paul Gibson, *Gay Male and Lesbian Youth Suicide*, in Report of the Secretary's Task Force on Youth Suicide 3-110, 3-128 (1989), cited in Nancy Tenney, *The Constitutional Imperative of Reality in Public School Curricula: Untruths About Homosex-*

In 1993, the Committee on Adolescence of the American Academy of Pediatrics determined that in struggling to reconcile their sexual identities with negative social pressures, gay and lesbian youth confront a "lack of accurate knowledge, [a] scarcity of positive role models, and an absence of opportunity for open discussion. Such rejection may lead to isolation, run-away behavior, homelessness, domestic violence, depression, suicide, substance abuse, and school or job failure."⁸⁰ In 1989, the U.S. Department of Health and Human Services released a study as part of the Report of the Secretary of Health and Human Services Task Force on Youth Suicide that concluded that "gay youth are 2 to 3 times more likely to attempt suicide than other young people . . . and may comprise up to 30 percent of completed youth suicides annually."⁸¹

The paucity of gay and lesbian role models in schools harms not only gay students, but heterosexual students as well, considering that all students benefit significantly from their exposure to reputable authority figures from differing religions, races, genders, ethnicities, and sexual orientations.⁸² In fact, the shortage of gay and lesbian role models in schools implicitly condones homophobic attitudes and violence against those students who identify themselves, or are identified (whether accurately or not), as lesbian or gay.⁸³

uality as a Violation of the First Amendment, 60 BROOKLYN L. REV. 1599, 1613 n.63 (1995) (reporting that within months of the Report's release, Dr. Louis W. Sullivan, Secretary of HHS under President Bush, attacked the portion of the Report that advocated ending discrimination against gay and lesbian youth, stating "I am strongly committed to advancing traditional family values. . . . In my opinion, the views expressed in the paper run contrary to that aim."). See also Joyce Murdoch, *Gay Youths' Deadly Despair: High Rate of Suicide Attempts Tracked*, WASH. POST, Oct. 24, 1988, at A1; Eve Kosofsky-Sedgwick, *How to Bring Your Kids Up Gay*, 29 SOCIAL TEXT 18 (1991) (examining the experiences of gay and lesbian children forced to undergo "reparative" therapy).

⁸² See *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954). Moreover, the Supreme Court has clarified that students have a First Amendment right to receive information which precludes school administrators from intentionally suppressing access to ideas. See *Board of Educ. v. Pico*, 457 U.S. 853, 880 (1982); *Keyishian v. Board of Educ.*, 385 U.S. 589, 603 ((quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Hand, J.) *aff'd* 326 U.S. 1 (1945) (alteration in original)) ("The classroom is peculiarly the marketplace of ideas. . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'").

⁸³ See Arthur Lipkin, *Project 10: Gay and Lesbian Stu-*

The Senators' comments also suggest that there are no excellent gay and lesbian schoolteachers who serve as role models to both gay and straight students. Not only are there thousands of highly competent gay men and lesbians educating children in the schools today,⁸⁴ it is highly likely that of all of the teachers that Senators Ashcroft and Nickles valued as excellent role models for themselves, one or more was gay.

3. "Ty Fox" as Red Herring

The Senators' contention that ENDA would have protected Jeffrey Bruton, the suburban Virginia coach and teacher, from being forced to resign from his position as a result of having appeared in gay pornographic videos is baseless. ENDA would prohibit covered employers from subjecting employees or candidates for employment "to a different standard or different treatment . . . on the basis of sexual orientation."⁸⁵ Presumably, Bruton was not treated any differently by his school administration than the administration would have treated any other schoolteacher who had appeared in pornographic films, regardless of whether the films were "straight" or "gay." The grounds for Bruton's discipline appear not to have been Bruton's sexual orientation, which still has not been publicly disclosed, but the fact that he was a pornographic video star. It appears that poor judgment, not sexual orientation, was what precipitated Bruton's discipline. Thus, contrary to the Senators' warnings, ENDA likely would not have protected Bruton against any adverse employment action by the school.⁸⁶

dents Find Acceptance in their School Community, *TEACHING TOLERANCE* 25 (Fall 1992) ("Of all the minorities in American school populations, young gays and lesbians are among the most frequently ridiculed, victimized and shunned."), cited in Nancy Tenney, *The Constitutional Imperative of Reality in Public School Curricula: Untruths About Homosexuality as a Violation of the First Amendment*, 60 *BROOK. L. REV.* 1599, 1610 n.44 (1995); see also Joyce Hunter, *Violence Against Lesbian and Male Gay Youths*, 5 *J. INTERPERSONAL VIOLENCE* 295, 297 (1990) (In study of 500 gay and lesbian youths, 40% were found to have experienced "violent physical attacks"). One study has found that gays and lesbians face victimization more frequently than any other minority group. See PETER FINN & TAYLOR McNEIL, *THE RESPONSE OF THE CRIMINAL JUSTICE SYSTEM TO BIAS CRIME: AN EXPLORATORY REVIEW* 2 (1987).

⁸⁴ See generally *ONE TEACHER IN 10: GAY AND LESBIAN EDUCATORS TELL THEIR STORIES* (Kevin Jennings ed., 1994); RITA M. KISSEN, *THE LAST CLOSET: THE REAL LIVES OF LESBIAN AND GAY TEACHERS* (1996).

4. *Effects of Existing State Non-Discrimination Statutes*

The Senators' concern that ENDA would enable gay and lesbian teachers to infuse their curricula with gay and lesbian topics is belied by the effects of state and local laws that prohibit discrimination on the basis of sexual orientation. Today, teachers in eleven states and over 100 local jurisdictions are protected from employment discrimination by ENDA-like statutes.⁸⁷ In addition, millions of children are educated in school districts controlled by cities and counties with non-discrimination ordinances. There is no evidence that gay and lesbian teachers in these districts have sought protection in anti-discrimination statutes for proselytizing on homosexuality in schools.⁸⁸ The fact that ENDA-like statutes at the state and local level have not enabled gay and lesbian teachers to proselytize is a strong indication that ENDA would not have the reverse effect if it were enacted.

IV. THE CATEGORICAL EXCLUSION OF GAY PEOPLE FROM TEACHING POSITIONS WOULD VIOLATE THE FOURTEENTH AMENDMENT

Not only are the concerns espoused by Senators Ashcroft and Nickles concerning gay people in teaching jobs negated by both the successful and productive work of lesbian and gay teachers in schools today and findings concerning the nature of homosexuality itself, the Senators' opinions beg the question of whether school administrators

⁸⁵ ENDA § 4.

⁸⁶ ENDA's construction provision confirms this assessment by clarifying that "[n]othing in this Act shall be construed to prohibit a covered entity from enforcing rules regarding nonprivate sexual conduct, if the rules of conduct are designed for, and uniformly applied to, all individuals regardless of sexual orientation." ENDA § 11.

⁸⁷ See *supra* note 16.

⁸⁸ In fact, a recent General Accounting Office report found that there was no perceptible spike in litigation of any kind, including claims brought by lesbian and gay schoolteachers, in those states with ENDA-like statutes in place. See Gen'l Acct. Off. Rep. on States' Experiences with Sexual Orientation Discrimination Laws B-277688, *Daily Lab. Rep. (BNA)* 206 (Oct. 24, 1997) (finding that in states with sexual orientation non-discrimination statutes in effect, "relatively few complaints of discrimination in employment on the basis of sexual orientation were filed annually; and that there was not evidence 'of large numbers of complaints immediately after the implementation of the sexual orientation statutes.'")

could categorically disqualify lesbians and gay men from teaching jobs at all. The exclusion of gay and lesbian people from teaching positions solely on the theory that they are intrinsically immoral and, thus, bad role models for children likely would violate the due process and equal protection guarantees of the Fourteenth Amendment.

A. Constitutional Due Process and the Emergence of the "Fitness to Teach" Test

With a few striking exceptions, such as *Gaylord*, courts over the last several decades have recognized that constitutional due process principles forbid school administrators from basing hiring and promotion decisions on standards that are not rationally related to teaching ability. The Fourteenth Amendment's Due Process Clause requires that the government afford citizens "due process" before depriving them of life, liberty, or property.⁸⁹ Like the Equal Protection Clause, the Due Process Clause requires that government actions be at least rationally related to a legitimate government purpose.⁹⁰ Thus, no person can be denied public employment based on factors that are unconnected with the responsibilities of that employment.⁹¹

1. *Norton v. Macy: The Irrelevance of Homosexual Orientation in Public Employment*

Some courts have correctly recognized that homosexual orientation alone does not affect the eligibility of an individual for public employment. For example, in *Norton v. Macy*,⁹² the Court of Appeals for the D.C. Circuit reversed the dismissal of a federal employee from a job at the National Aeronautics and Space Administration (NASA) for "homosexual behavior" outside of working hours, which the U.S. Civil Service Commission labeled "immoral."⁹³ The court held that the government

had failed to demonstrate that his "immoral" behavior would have an "ascertainable deleterious effect on the efficiency of the service" he provided in his job.⁹⁴ The court determined further that: "[a] pronouncement of 'immorality' tends to discourage careful analysis because it unavoidably connotes a violation of divine, Olympian, or otherwise universal standards of rectitude."⁹⁵

The court also found that the government had failed to establish a rational relationship between Mr. Norton's homosexuality and any threat to the efficiency of NASA operations, which was the government's only justification for the dismissal.⁹⁶

2. *Norton Applied to Gay and Lesbian Teachers*

Some courts have applied the "effect on service" principle articulated in *Norton* in adjudicating cases involving gay and lesbian teachers, correctly holding that sexual orientation may be a factor in public schoolteacher employment decisions only where it may impact the teacher's "fitness to teach." For example, in *Morrison v. State Board of Education*,⁹⁷ the California Supreme Court held that the state Board of Education could not revoke Marc Morrison's "life diploma" (i.e., state teaching certificate) on the grounds of a "limited, non-criminal physical relationship . . . of a homosexual nature."⁹⁸ Morrison was a schoolteacher in the Lowell, California Joint School District where he maintained a satisfactory performance record.⁹⁹ During his employment in the Lowell public school system, Morrison became friends with Fred Schneringer, another public schoolteacher.¹⁰⁰ In a period of marital difficulties, Mr. Schneringer had sex with Morrison on four separate occasions in a one-week period.¹⁰¹ One year after Schneringer and Morrison ended their affair, Schneringer reported Morrison's homosexuality to the Superintendent of the Lowell Joint School District, which resulted in the California Board of Education revoking Morrison's

⁸⁹ U.S. CONST. amend. XIV, § 1; see also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-1 at 1302-04 (2d ed. 1988).

⁹⁰ See, e.g., *Duke Power v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978); *Whalen v. Roe*, 429 U.S. 589 (1977).

⁹¹ See generally *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *Shelton v. Tucker*, 364 U.S. 479 (1960).

⁹² See generally 417 F.2d 1161 (D.C. Cir. 1969).

⁹³ See *id.* at 1164-65. See also *Scott v. Macy*, 349 F.2d 182, 184-85 (D.C. Cir. 1965) (holding that the government may not rely on mere allegations of homosexuality to discharge

an employee, but instead must identify specific conduct it finds immoral and demonstrate how such conduct affects the employee's fitness for position).

⁹⁴ *Norton*, 417 F.2d at 1165.

⁹⁵ *Id.*

⁹⁶ See *id.*

⁹⁷ 461 P.2d 375 (Cal. 1969) (en banc).

⁹⁸ *Id.* at 377-78.

⁹⁹ See *id.* at 377.

¹⁰⁰ See *id.*

¹⁰¹ See *id.* at 377-78.

life diploma.¹⁰²

In reversing the revocation, the court recognized that the Board of Education failed to present any evidence indicating that Morrison "had ever committed any act of misconduct whatsoever while teaching[,] and that "uninformed speculation or conjecture" about immorality was insufficient grounds to terminate Morrison's teaching privileges.¹⁰³ The court held that an admission of homosexual conduct, absent evidence of "unfitness to teach," was insufficient grounds for the revocation.¹⁰⁴

Morrison is not the only case that properly accords due process protection to gay and lesbian teachers terminated on the basis of vague notions of morality, and without regard to teaching ability and effectiveness. In *Board of Education v. Jack M.*,¹⁰⁵ the California Supreme Court, citing *Morrison*, held that a teacher arrested for "homosexual solicitation" was inappropriately fired from his elementary school teaching position because the teacher's arrest "did not demonstrate unfitness to

teach."¹⁰⁶ In *Jarvella v. Willoughby-Eastlake City School District*,¹⁰⁷ the Ohio Court of Common Pleas found that as long as a teacher's private conduct does not affect his professional achievement, his "private acts are his own business and may not be the basis of discipline."¹⁰⁸ Similarly, in *Erb v. Iowa State Board of Public Instruction*,¹⁰⁹ the Iowa Supreme Court held that in determining whether an individual is qualified to serve as a schoolteacher, "the personal moral views of board members cannot be relevant."¹¹⁰ Following this approach, courts across the nation began invalidating public schoolteacher terminations on such "immorality" grounds as unwed pregnancy,¹¹¹ adultery,¹¹² and unmarried cohabitation.¹¹³

A more recent case reminiscent of *Morrison* is *Ross v. Springfield School District No. 19*.¹¹⁴ In *Ross*, the Supreme Court of Oregon invalidated a schoolteacher's discharge for "immorality" where the determination of immorality was based solely on references to "community moral standards"

¹⁰² See *id.* at 378.

¹⁰³ *Id.* at 378, 393.

¹⁰⁴ *Id.* at 391. The court specified the following criteria for determining "unfitness to teach":

[T]he likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blameworthiness of the motives resulting in the conduct, . . . and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon constitutional rights of the teacher involved or other teachers.

Id. at 386 (citations omitted).

¹⁰⁵ 19 Cal.3d 691 (1977).

¹⁰⁶ *Id.* at 694.

¹⁰⁷ 233 N.E.2d 143 (Ct. C.P. Ohio 1967).

¹⁰⁸ *Id.* at 146.

¹⁰⁹ 216 N.W. 2d 339 (Iowa 1974).

¹¹⁰ *Id.* at 343.

¹¹¹ See, e.g., *Ponton v. Newport News Sch. Bd.*, 632 F. Supp. 1056 (E.D. Va. 1986). In *Ponton*, an unwed pregnant teacher was given the choice of quitting, getting married, or taking an unpaid leave of absence when it became known that she was pregnant. See *id.* at 1059. A Virginia federal court sided with *Ponton*, who claimed that the school board's actions violated her Constitutional right to privacy and constituted sex discrimination proscribed by Title VII. See *id.* at 1061. The court held that there was no evidence that being pregnant out of wedlock indicated some moral defect that would render *Ponton* unfit to teach, "no evidence that [she] intended to proselytize her students regarding the issue of unwed pregnancy[,] and no danger that her being pregnant out of wedlock would be seen as "a School Board-sponsored statement regarding the desirability of pregnancy out of wed-

lock." *Id.* at 1062-63. See also *Drake v. Covington County Bd. of Educ.*, 371 F. Supp. 974, 979 (M.D. Ala. 1974) (holding that an Alabama statute allowing termination of a teacher based on immorality was not facially unconstitutional due to vagueness, but violated Drake's constitutional right to privacy as applied to her); *Leechburg Area Sch. Dist. v. Pennsylvania*, 339 A.2d 850, 853 (Pa. Commw. Ct. 1975) (denying unwed pregnant teachers a leave of absence, thus terminating their employment, violates Section 5(a) of the Pennsylvania Human Relations Act, which prohibited discrimination based on sex).

¹¹² See *Erb v. Iowa State Bd. of Pub. Instruction*, 216 N.W.2d 339 (Iowa 1974). In *Erb*, the Iowa Supreme Court restored Richard Erb's high school teaching certificate, which had been revoked when the other teacher's husband brought to the school board's attention that Erb had been involved in an adulterous affair with another teacher (who was leaving the teaching profession to pursue a different career). See *id.* at 341. The court found notable that numerous witnesses, including Erb's principal and superintendent, testified that his teaching was highly rated and was unaffected by the affair. See *id.* The court in *Erb* did not find evidence "of a reasonable likelihood that the teacher's retention in the profession [would] adversely affect the school community." *Id.* at 344.

¹¹³ See *Thompson v. Southwest Sch. Dist.*, 483 F. Supp. 1170 (W.D. Mo. 1980). In *Thompson*, the plaintiff was a second grade teacher who was cohabiting with a man to whom she was not married. See *id.* at 1173. Her ability as a teacher was never questioned. See *id.* at 1175. She was removed due to fear of a public outcry over the matter. See *id.* at 1183. The court stated that the "fact that some parents may have an adverse attitude towards plaintiff is not sufficient evidence . . . that an attitude would prevail in the classroom that would undermine the learning environment." *Id.*

¹¹⁴ 716 P.2d 724 (Or. 1986) (en banc).

and where the termination was in no way based on negative findings concerning the school-teacher's fitness to teach.¹¹⁵

B. Equal Protection

Categorically disqualifying gay men and lesbians from teaching positions solely on the ground that they are "not the right type of role models" would also likely violate constitutional equal protection principles. The Fourteenth Amendment's Equal Protection Clause prohibits state and local governments from engaging in intentional invidious discrimination between otherwise similarly situated persons based on membership in a definable class, absent a rational basis for doing so.¹¹⁶ Under the basic "mere rationality" standard of review for equal protection cases not involving a "suspect class" (i.e., race, religion, etc.) or a fundamental right (e.g., speech), the court asks "whether it is conceivable that the classification bears a rational relationship to an end of government which is not prohibited by the Constitution."¹¹⁷

1. *Romer v. Evans*

In its landmark 1996 *Romer v. Evans*¹¹⁸ decision, the Supreme Court relied upon the Constitution's equal protection guarantee to protect the interests of gay people. *Romer* held that Amendment 2 to the Colorado Constitution violated the Equal Protection Clause insofar as it failed to further a proper legislative end by prohibiting an entire class of persons (i.e., gay and lesbian Coloradans) from seeking legislation to redress injustices.¹¹⁹ *Romer* elucidated what the Supreme Court consid-

ers not to be a rational basis for discrimination against gay people. The state had argued that the rationale for Amendment 2 included "respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality."¹²⁰ Justice Kennedy, writing for the majority, rejected the state's rationale, declaring that animosity toward the class of homosexuals is not a legitimate basis for state action.¹²¹ Justice Kennedy asserted that Amendment 2 "is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board."¹²² He wrote that Amendment 2 "classifie[d] homosexuals" as "unequal to everyone else. This Colorado cannot do."¹²³

To a certain extent, *Romer* redeems the Supreme Court's earlier infamous decision affecting gay and lesbian civil rights, *Bowers v. Hardwick*.¹²⁴ In *Hardwick*, the Supreme Court found that the Georgia sodomy statute, which prohibits private, consensual sodomy between two adults, does not run afoul of an individual's right to privacy as an element of the Fourteenth Amendment right to due process,¹²⁵ which, as discussed above, prohibits state restrictions on human conduct that constitute an unreasonable denial of an individual's "life, liberty, or property."¹²⁶ *Hardwick* not only armed states with the Supreme Court's *imprimatur* to continue criminalizing homosexual sexual relations,¹²⁷ but had the broader effect of legitimizing judicial prejudices against gay men and lesbians in matters unrelated to sexual relations.¹²⁸

Hardwick generated intense negative scholarly criticism against the Supreme Court,¹²⁹ particularly because it denied gay people the type of per-

¹¹⁵ See *id.* at 730-31.

¹¹⁶ See U.S. CONST. amend. XIV, § 1 (a State shall not "deny to any person within its jurisdiction the equal protection of the laws."); see also *TRIBE*, *supra* note 89, §§ 16-1, 16-2, at 1436-43.

¹¹⁷ JOHN E. NOWAK et al., CONSTITUTIONAL LAW § 14.1, at 524 (3d ed. 1986).

¹¹⁸ 116 S. Ct. 1620 (1996).

¹¹⁹ See *id.* at 1629.

¹²⁰ *Id.*

¹²¹ See *id.* at 1628-29.

¹²² *Id.* at 1628.

¹²³ *Id.* at 1629.

¹²⁴ 478 U.S. 186 (1986).

¹²⁵ See *id.* at 191, 194-96.

¹²⁶ U.S. CONST., amend. XIV; see also *TRIBE*, *supra* note 89, § 15-1, at 1302.

¹²⁷ See *Missouri v. Walsh*, 713 S.W.2d 508, 511 (Mo. 1986) (en banc) (relying on the United States Supreme Court's two-week-old decision in *Hardwick*, the Missouri Supreme Court upheld that state's sodomy law from a privacy challenge); *Louisiana v. Neal*, 500 So.2d 374, 378 (La. 1987) (upholding anti-solicitation and sodomy statutes relying on *Hardwick*).

¹²⁸ See, e.g., *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) ("After *Hardwick* it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm."). In large measure, some judges have misapplied *Hardwick* in starting from the premise that all homosexual conduct is equivalent to the homosexual sodomy at issue in *Hardwick*. See *Feldblum*, *supra* note 46, at 283 (citing *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984) and *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987)).

¹²⁹ See, e.g., Jed Rubenfeld, *The Right of Privacy*, 102 HARV.

sonal freedom to engage in private, consensual sexual relationships it had accorded heterosexuals in a series of important privacy decisions.¹³⁰ Criticism of *Hardwick* as a wrongly-decided decision intensified when it became known that Justice Lewis F. Powell, the deciding vote on the *Hardwick* majority, later regretted voting to uphold the Georgia sodomy statute. In an October 18, 1990 lecture at New York University Law School, Justice Powell was asked how he reconciled his support of *Roe v. Wade*¹³¹ with his vote in *Hardwick*, to which he responded "I think I probably made a mistake in that one."¹³²

2. *Nabozny v. Podlesny*

That *Romer* has to some extent eclipsed *Hardwick* as the benchmark for applying constitutional protections to gay and lesbian Americans was evident in the case of *Nabozny v. Podlesny*.¹³³ In *Nabozny*, Jamie Nabozny sued the Ashland, Wisconsin school district for, *inter alia*, violating his Fourteenth Amendment right to equal protection by discriminating against him as a homosexual. Nabozny argued that school administrators not only ignored his requests for assistance in responding to continuous verbal and physical anti-gay abuse from fellow students, but also themselves mocked Nabozny's predicament.¹³⁴ Applying mere rational review scrutiny, the Seventh Circuit held that "[t]here can be little doubt that homosexuals are an identifiable minority subjected to discrimination in our society," and that "discrimination against Nabozny based on his sexual orientation . . . was unlawful."¹³⁵ Having found the board liable under basic rational review, the court refused to express an opinion on whether sexual orientation is an "obvious, immu-

table, or distinguishing" characteristic—a standard for the application of strict scrutiny—but indicated nevertheless that "it does seem dubious to suggest that someone would choose to be homosexual, absent some genetic predisposition, given the considerable discrimination leveled against homosexuals."¹³⁶

3. *Romer and Nabozny Applied to Gay and Lesbian Teachers*

Romer and *Nabozny* evince an important evolution in the attitude of the American judiciary. No doubt influenced by society's evolving understanding of the nature of sexual orientation, it appears that judges, like certain legislators, are much less willing to enforce traditional anti-gay prejudices and instead have begun to view gay people as multi-faceted individuals entitled to the political and social enfranchisement afforded all Americans.

As a result, it is likely that a post-*Romer* court would find that categorically excluding gay and lesbian people from teaching positions for no other government end than to endorse the anti-gay sentiments of only one sector of the community, would violate the right to equal protection of the affected gay and lesbian people. Under basic rational basis review, the level of scrutiny applied in *Romer*, there is no constitutional violation if "there is any reasonably conceivable state of facts" that would provide a rational basis for the government's conduct.¹³⁷ It would be highly unlikely that a court would be able to garner any rational basis for a school board's categorical disqualification of gay men and lesbians from schoolteacher positions for no other reason than the belief that

L. REV. 737, 799-802 (1989) (contending that the *Hardwick* majority incorrectly applied the due process test); Thomas B. Stoddard, *Bowers v. Hardwick: Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648, 655-56 (1987) (arguing that *Hardwick* constitutes nothing more than the embodiment of the justices' anti-homosexual sentiment); Kendall Thomas, *Beyond the Privacy Principle*, 92 COL. L. REV. 1431, 1461 (1992) (positing that *Hardwick* illegitimately endorses cruel and unusual punishment against homosexuals); William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319, 325-330 (1994) (contending that *Hardwick* violates gay and lesbian citizens' First Amendment expression rights).

¹³⁰ See, e.g., *Loving v. Virginia*, 338 U.S. 1 (1967) (right of interracial couple to marry); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right of unmarried persons to contraception); *Roe v.*

Wade, 410 U.S. 113 (1973) (right to abortion); and *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (right to access of contraceptive technology).

¹³¹ 410 U.S. 113 (1973).

¹³² JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 518-530 (1994), excerpted in RUBENSTEIN, *supra* note 46, at 245, 251. In confirming his remark to a reporter, he explained "When I had the opportunity to reread the opinions a few months later, I thought the dissent had the better of the arguments." *Id.*

¹³³ 92 F.3d 446 (7th Cir. 1996).

¹³⁴ *Id.* at 449.

¹³⁵ *Id.* at 457.

¹³⁶ See *id.* at 457 n.10.

¹³⁷ *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

gay people are intrinsically immoral and, thus, are poor role models for children.

V. SENATORS MISCHARACTERIZE ENDA'S EFFECTS ON TEACHERS' FIRST AMENDMENT RIGHTS

A. ENDA Would Not Alter Existing Caselaw According Curricular and Pedagogical Decisions to School Boards and School Administrators

Senator Ashcroft's opposition to employment non-discrimination protection for what he terms "open homosexual leaders" and "gay activists, as teachers in the fifth grade," presupposes that ENDA's passage would permit gay and lesbian teachers to proselytize in the classroom. Such a characterization of ENDA's scope is fundamentally incorrect. ENDA's only function is to ensure that employees and candidates are judged by their ability to do their job and not on the basis of their sexual orientation. Thus, ENDA generally would not affect the ability of school boards and school administrators to control the classroom speech of teachers.

1. *Hazelwood School Dist. v. Kuhlmeier and its Progeny Confirm the Power of School Boards Over Reasonable Restrictions on In-Classroom Speech*

The Supreme Court has long recognized that decisions about the appropriateness of classroom curricula are the province of school boards and school administrators. Although the Court has acknowledged that it cannot "be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"¹³⁸ it has held consistently that the constitutional rights of teachers and students in school cannot be as extensive as they are outside the schoolhouse. School officials must

have control over curriculum and conduct in order to ensure that reasonably uniform instruction standards are applied in the classroom setting.

Although no Supreme Court precedent directly addresses the scope of the First Amendment rights of teachers in the classroom, the case of *Hazelwood School District v. Kuhlmeier*,¹³⁹ which addresses the in-school free speech rights of students, has provided the judicial construct upon which lower courts have based standards for the protection of in-school teacher speech. The Supreme Court in *Hazelwood* found that school officials did not violate the free speech right of students by deleting two pages of articles concerning pregnancy and divorce from the school newspaper.¹⁴⁰ It explained that where school facilities have not been opened for "indiscriminate use by the general public;" the school is not a public forum.¹⁴¹ As a result, "school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community."¹⁴² The court held that reasonable restrictions on in-school speech, however, must be reasonably related to "legitimate pedagogical concerns."¹⁴³

The Eleventh Circuit Court of Appeals was the first Federal Circuit Court to apply *Hazelwood* to the in-class free speech rights of teachers. In *Bishop v. Aronov*,¹⁴⁴ the court found that a memorandum from the head of a state university department, instructing a professor to refrain from interjecting religious discussions into his classes, did not violate the professor's First Amendment rights because the memorandum's restrictions only applied to the classroom speech of the professor "wherever he purports to conduct a class for the University."¹⁴⁵

The First Circuit similarly relied upon *Hazelwood* in its 1993 *Ward v. Hickey*¹⁴⁶ decision, where it rejected a high school teacher's First Amendment claim against her local school board for re-

¹³⁸ *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969) (allowing students, suspended for wearing armbands to protest the Vietnam war, to express controversial opinions as long as they did not materially and substantially interfere with the discipline in or operation of the school, or collide with the rights of others).

¹³⁹ 484 U.S. 260 (1988).

¹⁴⁰ *See id.* at 266.

¹⁴¹ *Id.* at 267 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983)).

¹⁴² *Id.* (quoting *Perry*, 460 U.S. at 46 n.7) (emphasis ad-

ded).

¹⁴³ *Id.* at 273. The court identified at least three such concerns: (1) "that participants learn whatever the activity is designed to teach," (2) "that readers or listeners are not exposed to material that may be inappropriate for their level of maturity," and (3) "that the views of the individual speaker are not erroneously attributed to the school." *Id.* at 271.

¹⁴⁴ 926 F.2d 1066 (11th Cir. 1991).

¹⁴⁵ *Id.* at 1075-76.

¹⁴⁶ 996 F.2d 448 (1st Cir. 1993).

fusing to rehire her in part because she had led a discussion in a ninth-grade biology class of the abortion of Down's Syndrome fetuses.¹⁴⁷ The court stated: "we find that a school committee may regulate a teacher's classroom speech if: (1) the regulation is reasonably related to a legitimate pedagogical concern; and (2) the school provided the teacher with notice of what conduct was prohibited[.]"¹⁴⁸

2. *Proselytizing is Not Protected In-Classroom Speech*

Senator Ashcroft's concerns notwithstanding, courts have held that school administrators may properly restrict in-classroom proselytizing or recruitment for political or social causes by teachers. In *Burns v. Rovaldi*,¹⁴⁹ a Connecticut federal district court upheld the dismissal of a public teacher who incorporated into his penmanship class a pen-pal program between his students and his fiancée through which the students received letters advocating communism and attacking the American capitalist system.¹⁵⁰ Other courts have held similarly,¹⁵¹ holding that proselytization of any kind is contrary to the interest of the state in preserving the educational process and properly socializing children. In *James v. Board of Education*,¹⁵² the Second Circuit found that "[w]hen a teacher is only content if he persuades his students that his values and only his values ought to be their values, then it is not unreasonable to expect the state to protect impressionable children from such dogmatism."¹⁵³

The notion that ENDA would protect lesbian and gay public schoolteachers for proselytizing on homosexuality in public schools also is inconsistent with the nature and origins of homosexuality. Presumably, most lesbian and gay public schoolteachers understand the generally unchangeable

nature of sexual orientation and would recognize that proselytizing or otherwise attempting to "convert" students to homosexuality would be a fundamentally futile exercise. Moreover, given that homophobia remains a serious societal affliction, and the fact that lesbian and gay schoolteachers continue to be politically useful targets for anti-gay activists, it is hard to believe that lesbian and gay schoolteachers would put their jobs at risk by attempting to "recruit" students into homosexuality, regardless of the futility of the effort. In addition, the belief that ENDA somehow would empower lesbian and gay schoolteachers to proselytize without recourse not only misconstrues the narrow scope of ENDA (i.e., prohibiting employment discrimination on the basis of sexual orientation), but also is negated by the track record of ENDA-like laws in ten states and many local jurisdictions. There is no recorded instance of any of these laws being used to protect lesbian or gay schoolteachers from disciplinary action for any form of proselytization.¹⁵⁴

B. Teachers' Out-of-School Speech is Constitutionally Protected

Senator Ashcroft's suggestion that a school board should be permitted to bar the employment of "open homosexual leaders" and "gay activists" also mistakenly connotes that passage of ENDA somehow would alter the ability of school boards to govern the out-of-school speech of teachers. It appears that Senator Ashcroft is under the mistaken belief that school boards and school administrators now have the ability to discriminate against teachers who are politically active and that ENDA would interfere with this ability. Because ENDA would only prohibit *employment* discrimination on the basis of sexual

¹⁴⁷ See *id.* at 452.

¹⁴⁸ *Id.* (citation omitted). The *Ward* court noted that "in this circuit, we have determined the propriety of school regulations by considering circumstances such as age and sophistication of students, relationship between teaching method and valid educational objectives, and context and manner of presentation." *Id.* The court cited to prior First Circuit precedent, such as *Mailloux v. Kiley*, 448 F.2d 1242 (1st Cir. 1971). The *Mailloux* court had recognized that

free speech does not grant teachers a license to say or write in class whatever they may feel like, and that the propriety of regulations or sanctions must depend on such circumstances as the age and sophistication of the students, the closeness of the relation between the specific technique used and some concededly valid educa-

tional objective, and the context and manner of presentation.

Id. at 1243; see also *Keefe v. Geanakos*, 418 F.2d 359, 362 (1st Cir. 1969) (noting that "the offensiveness of language and the particular propriety or impropriety is dependent on the circumstances of the utterance").

¹⁴⁹ 477 F. Supp. 270-71, 276 (D. Conn. 1979).

¹⁵⁰ *Id.* at 270, 276.

¹⁵¹ See *Russo v. Central Sch. Dist. No. 1*, 469 F.2d 623, 632 (2d Cir. 1972); *James v. Board of Educ.*, 461 F.2d 566, 573 (2d Cir. 1972).

¹⁵² 461 F.2d 566 (2d Cir. 1972).

¹⁵³ *Id.* at 573.

¹⁵⁴ See *supra* note 16.

orientation, it likely would have no impact on the well-settled body of law governing teachers' rights to free speech outside of the classroom.

The principal Supreme Court decision clarifying the nature of teachers' free speech rights outside of the classroom is *Pickering v. Board of Education*.¹⁵⁵ In *Pickering*, the Court invalidated as unconstitutional the firing of a teacher following the publication in a local newspaper of the teacher's letter to the editor criticizing the board's financial activities.¹⁵⁶

The Court recognized that, in free speech cases involving public schoolteachers, there is a conflict between the state's interest as an employer in controlling the speech of its employees and the expressive interests of those employees. Citing its earlier decision in *Keyishian v. Board of Regents*, the Court held that school boards may not compel teachers "to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work."¹⁵⁷

In reaching this conclusion, the Court implemented a balancing test that weighs "the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."¹⁵⁸ This test allows a school to restrict or punish a public schoolteacher's speech on matters of public concern only if the speech would harm the school's ability to operate efficiently or inhibit the teacher's ability to carry out his or her duties. In implementing this test, the Court held that school boards must respect a teacher's right to expression outside the classroom because there, a teacher's interest in free expression exceeds any school interest in suppressing the expression as a way of promoting its own interests.¹⁵⁹

Pickering's progeny confirms that the nature of

government employees' speech determines the government's ability to restrict that speech. For example, in *Connick v. Myers*,¹⁶⁰ the Supreme Court denied the claim of an assistant district attorney who challenged her dismissal, which followed her distribution of a questionnaire to colleagues about their work conditions.¹⁶¹ The Court held that the employee's expression was merely internal workplace speech, did not address a matter of public concern and, therefore, was not protected by the First Amendment.¹⁶² By contrast, the Court in *Rankin v. McPherson*¹⁶³ invalidated the dismissal of a government employee who, following the assassination attempt against President Ronald Reagan, stated to a co-worker: "[I]f they go for him again, I hope they get him."¹⁶⁴ The Court held that the employee's speech could be "fairly characterized as constituting speech on a matter of public concern" and thus was protected by the Free Speech clause.¹⁶⁵

Lower courts have applied the *Pickering* rule to protect teachers from retaliation for their expression about sexual orientation. In *National Gay Task Force v. Board of Education*,¹⁶⁶ the Tenth Circuit Court of Appeals, which an evenly split Supreme Court affirmed, invalidated a portion of Oklahoma's "Helm Bill," which replicated the language of the infamous anti-gay California Briggs Initiative.¹⁶⁷ The Tenth Circuit found that the prohibition against "advocating . . . encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees" was unconstitutionally overbroad.¹⁶⁸ Citing *Pickering*, the Tenth Circuit reasoned that although the state has an interest in regulating schoolteacher speech, it can do so only when the expression "results in a material or substantial . . . disruption in the normal activities of the school."¹⁶⁹ The Court concluded that the Oklahoma Board of Education had "made no such showing."¹⁷⁰ In the 1974 *Acanfora*

¹⁵⁵ 391 U.S. 563 (1969).

¹⁵⁶ See *Pickering*, 391 U.S. at 573.

¹⁵⁷ *Id.* at 568 (*Keyishian v. Board of Regents*, 385 U.S. 589, 606 (1967) (holding that states may not punish teachers for out-of-school associations absent a compelling state interest)).

¹⁵⁸ *Id.*

¹⁵⁹ See *id.* at 572.

¹⁶⁰ 461 U.S. 138, 154 (1983).

¹⁶¹ See *id.* at 154.

¹⁶² See *id.*

¹⁶³ 483 U.S. 378 (1987).

¹⁶⁴ *Id.* at 381.

¹⁶⁵ *Id.* at 384 (quoting *Connick*, 461 U.S. at 146).

¹⁶⁶ 729 F.2d 1270, (10th Cir. 1984), *aff'd by an equally divided Court*, 470 U.S. 903 (1985).

¹⁶⁷ 729 F.2d at 1272.

¹⁶⁸ *Id.* at 1272, 1275.

¹⁶⁹ *Id.* at 1274, also citing *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969).

¹⁷⁰ *Id.*

*v. Board of Education*¹⁷¹ case, the Supreme Court let stand a Fourth Circuit ruling that a gay high school teacher's statements in press and television interviews regarding his sexuality did not disrupt his workplace and were protected under the First Amendment.¹⁷² Similarly, in *Aumiller v. University of Delaware*,¹⁷³ the Delaware Federal District Court found that Aumiller's public statements about homosexuality did not "impede[] his performance of his daily duties, substantially disrupt[] the University, violate[] an express need for confidentiality, or disrupt[] his working relationship with his superiors."¹⁷⁴

In sum, it is unlikely that a school board or school administrator would succeed in disciplining a schoolteacher for "gay activism" or "homosexual leadership" outside of the classroom. Such expression addresses a matter of public concern (i.e., equal rights for lesbians and gay men) and most likely would not disrupt school activities nor diminish the teacher's ability to carry out his or her duties.

C. Gay and Lesbian Teachers' Out-of-Classroom "PDAs" Are Constitutionally Protected

The argument made on the Senate floor that

under ENDA, a school board would be prohibited from "tak[ing] action" against a male teacher who "during nonschool hours and in public, holds hands, walks arm in arm with his [boy]friend, and engages in some kissing"¹⁷⁵ begs the question of whether school boards can now, absent ENDA, regulate out-of-classroom PDAs in general and proscribe only same-sex out-of-classroom PDAs specifically. They cannot. This argument appears to overlook the fact that, regardless of whether ENDA is enacted, the Constitution's free speech and equal protection guarantees would forbid a school board or school administrator from implementing such a blatant double standard.

1. PDAs as Constitutionally Protected Speech

Although most public schoolteachers, like other public employees, may be dismissed without cause,¹⁷⁶ they cannot be dismissed or otherwise disciplined as a result of their exercise of a constitutional right.¹⁷⁷ Moreover, although constitutional protection of individual expression traditionally has been interpreted as covering only speaking or writing, contemporary courts have accorded such protection to "symbolic" or political speech as well.¹⁷⁸ Public displays of affection between a gay or lesbian teacher and another per-

¹⁷¹ 491 F.2d 498 (4th Cir. 1974).

¹⁷² *Id.* at 499. The First Amendment principle enunciated by the Fourth Circuit in *Acanfora* was enforced a few years later in *Aumiller v. University of Delaware*, by a Delaware Federal district court. See 434 F. Supp. 1273 (D. Del. 1977). In *Aumiller*, the court found that Aumiller's public statements about homosexuality did not "impede[] his performance of his daily duties, substantially disrupt[] the University, violate[] an express need for confidentiality, or disrupt[] his working relationship with his superiors." *Id.* at 1312. Similarly, in *National Gay Task Force*, the Supreme Court let stand a Tenth Circuit decision upholding a state statute's constitutionality insofar as it provided for the dismissal for engaging in "public homosexual conduct," but unconstitutionally overbroad and violative of the First Amendment insofar as "public homosexual conduct" included "advocacy." 729 F.2d at 1273-74. The Court opined that the state's right in regulating the speech of its employees overcomes the teacher's free speech rights only when the free speech results in a substantial or material interference or disruption in school activities, neither of which was demonstrated by the State in this case. *Id.* at 1274-75.

¹⁷³ 434 F. Supp. 1273 (D. Del. 1977).

¹⁷⁴ *Id.* at 1273.

¹⁷⁵ 142 CONG. REC. S9986, S9993 (daily ed. Sept. 6, 1996) (statement of Sen. Hatch). These assertions are quite reminiscent of those articulated by Lynn H. Greene, an anti-gay activist in Oregon who fought for the rejection of an anti-discrimination ordinance in Eugene, Oregon by declaring

that the ordinance "would encourage homosexuals to kiss, caress and dance in public, slap fannies, ask heterosexuals for dates at places of employment or in bars, and will even allow for the occasional touching of the genitals." *Gay Rights Voted Down in Eugene*, S.F. CHRON., date unknown (quoted in HARBECK, *supra* note 37, at 55).

¹⁷⁶ See, e.g., *Board of Regents v. Roth*, 408 U.S. 564 (1972) (finding that public employees may be discharged without cause and without a prior hearing where there is no contractual expectancy of continued employment).

¹⁷⁷ See *Pickering*, 391 U.S. at 563 (prohibiting the dismissal of public employees for exercising free speech rights in absence of overriding considerations regarding workplace harmony and discipline); cf. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977) (public schoolteacher's exercise of constitutional right may contribute to dismissal or other discipline as long as exercise of right not primary motivating factor justifying employment action).

¹⁷⁸ See, e.g., *United States v. O'Brien*, 391 U.S. 367 (1968) (deeming that draft card burning prohibition is not related to expression because law "does not distinguish between public and private destruction"); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969); *Cox v. Louisiana*, 379 U.S. 559 (1965) (picketing); *International Bhd. of Teamsters, Local 695 v. Vogt, Inc.*, 354 U.S. 284 (1957) (picketing); *Spence v. Washington*, 418 U.S. 405 (1974) (placing peace symbols on, and then displaying, American flag); *Cohen v. California*, 403 U.S. 15 (1971) (wearing jacket bearing words "Fuck the Draft"); *Brown v. Louisiana*, 383 U.S. 131

son of the same sex during nonschool hours may be considered a form of such protected "symbolic" or political speech.¹⁷⁹ Courts have disagreed on the kinds of same-sex expressions, however, that could be deemed protectible speech.

a. *Fricke v. Lynch*

In *Fricke v. Lynch*,¹⁸⁰ a Federal District Court in Rhode Island held that a male student's plan to take a male date to his senior prom had "significant expressive content" and thus was protected by the First Amendment as symbolic speech.¹⁸¹ Aaron Fricke identified himself as gay to his school community and requested permission to take a male escort to the prom. The school denied Fricke's request, claiming that Aaron's attending the prom with a same-sex escort may incite violence and may result in Aaron or his escort being attacked by other students.¹⁸² Disagreeing, the court found that although the action of going to a prom may not have expressive import for most people, it did for Fricke.¹⁸³ The court noted further that Fricke "wants to go because he feels he has a right to attend and participate just like all other students and that it would be dishonest to his own sexual identity to take a girl to the dance."¹⁸⁴ Fricke also testified that he thought his attendance "would have a certain political element and would be a statement for equal rights and human rights."¹⁸⁵

The *Fricke* court applied the Supreme Court's *United States v. O'Brien* test,¹⁸⁶ which governs the review of regulations that incidentally infringe upon an individual's expression, and found that the school's denial of Fricke's request violated his

freedom of expression right because the school could have taken "security measures to control the risk of harm" posed by Fricke's symbolic speech.¹⁸⁷ The *Fricke* court also noted that in order for the state to restrict a "particular expression of opinion," it must "show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."¹⁸⁸

b. *Gay Law Students Association v. Pacific Telephone and Telegraph Co.*

Fricke is not the only case in which a court has held that certain types of homosexual expression have symbolic or political importance. In *Gay Law Students Association v. Pacific Telephone and Telegraph Co.* ("PTT"),¹⁸⁹ the California Supreme Court held that the policies and practices of the public telephone utility denying employment to "manifest" homosexuals, or other persons "who make an issue of their homosexuality" violated both the California and Federal Equal Protection Clauses and the state labor code.¹⁹⁰ The PTT court held that employee expression involving self-identification as homosexual, speech that "defends" homosexuality, or speech that discloses personal affiliation with gay rights organizations, can be considered protectible political speech.¹⁹¹ The court acknowledged that "one important aspect of the struggle for equal rights is to induce homosexual individuals to 'come out of the closet'. . . ." ¹⁹² Accordingly, the court held that PTT's discriminatory policies constituted an "attempt to coerce or influence. . . employees. . . to. . . refrain from adopting [a] particular course

(1966) (remaining in segregated facility); *Thornhill v. Alabama*, 310 U.S. 88 (1940) (loitering and picketing); *Stromberg v. California*, 283 U.S. 359 (1931) (displaying red flag).

¹⁷⁹ See *TRIBE*, *supra* note 89, § 12-7, at 827-28 (positing that all "speech" is a combination of expression and conduct and that distinctions between speech and conduct are less dispositive of the permissibility of a restriction than is the basis for the restriction). See also David Cole and William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319 (1994) (positing that discrimination against a gay or lesbian individual on the basis of expressive activity that identifies the individual as a homosexual should be viewed as a violation of the individual's free speech right).

¹⁸⁰ 491 F. Supp. 381 (D.R.I. 1980).

¹⁸¹ *Id.* at 388.

¹⁸² *Id.* at 383-84.

¹⁸³ See *id.*

¹⁸⁴ *Id.* at 385.

¹⁸⁵ *Id.*

¹⁸⁶ 391 U.S. at 378-80. *O'Brien* asks the following four questions:

(1) was the regulation within the constitutional power of government, (2) did it further an important or substantial government interest, (3) was the governmental interest unrelated to the suppression of free expression, and (4) was the incidental restriction of alleged first amendment freedoms no greater than essential to further that interest?

Fricke, 491 F. Supp. at 385 (citing application of *O'Brien* test by *Gay Students Org. v. Bonner*, 509 F.2d 652 (1st Cir. 1974).

¹⁸⁷ *Fricke*, 491 F. Supp. at 385.

¹⁸⁸ *Id.* at 386.

¹⁸⁹ 24 Cal. 3d 458, 488 (1979).

¹⁹⁰ *Id.* at 488.

¹⁹¹ *Id.*

¹⁹² *Id.*

or line of political activity," in violation of these employees' First Amendment rights.¹⁹³

c. *Rowland v. Mad River Local School District*

The Sixth Circuit's *Rowland v. Mad River Local School District*¹⁹⁴ decision, however, argues against treating an expression of homosexuality as a matter of public concern satisfying the *Pickering* test.¹⁹⁵ Marjorie Rowland, a high school guidance counselor, was transferred to a position with no student contact and then was told her contract would not be renewed because she had talked about her bisexuality with coworkers.¹⁹⁶ The Sixth Circuit rejected Rowland's First Amendment challenge, holding that because Rowland had discussed her bisexuality with her coworkers privately and in confidence, and because "[t]here was absolutely no evidence of any public concern in the community . . . with the issue of bisexuality among school personnel," Rowland's statements about her bisexuality did not touch a matter of public concern and thus merited no First Amendment protection.¹⁹⁷

Rowland was wrongly decided. Most notably, in discounting Marjorie Rowland's speech as "private," the Sixth Circuit inappropriately ignored the fact that the Mad River Local School District disciplined Rowland *because of* how the community would have reacted to her bisexuality. In his dissent from the Supreme Court's denial of *certiorari*, Justice Brennan, who was joined by Justice Marshall, acknowledged correctly that the homosexuality or bisexuality of a schoolteacher is a matter of public concern, regardless of whether that schoolteacher's sexual orientation is announced to the public.¹⁹⁸

Even if *Rowland* had been correctly decided, however, it could easily be distinguished from the

case of a gay or lesbian schoolteacher who is disciplined for engaging in out-of-classroom same-sex PDAs. Unlike Rowland's confidential conversations with her colleagues, PDAs, by their nature, are clearly "public."

d. *Shahar v. Bowers*

Another case that muddles the free speech rights of gay and lesbian schoolteachers is the Eleventh Circuit's relatively recent *Shahar v. Bowers*¹⁹⁹ decision. Although not a case dealing with schoolteachers specifically, *Shahar* does address the expression rights of gay and lesbian public employees and, thus, is relevant to this analysis. In *Shahar*, Georgia Attorney General Michael J. Bowers—of *Bowers v. Hardwick* fame—succeeded at persuading the Eleventh Circuit that he violated no law when he withdrew a job offer to an attorney, Robin Shahar, on the basis that Shahar had entered into a lesbian marriage.²⁰⁰ Applying the *Pickering* balancing test, the court found that the Attorney General's interest in hiring assistant attorneys general "in whom he has trust" outweighed Shahar's right to free speech (as exercised in her same-sex marriage ceremony).²⁰¹ Alluding to *Hardwick*, the court found relevant that the Attorney General "had already engaged in and won a recent battle about homosexual sodomy,"²⁰² and that it was reasonable for Bowers to have considered that Shahar's wedding could have affected her "credibility," would have "interfere[d] with the Department's ability to handle certain kinds of controversial matters" involving gay people, and would "create other difficulties within the department which would be likely to harm the public perception of the Department."²⁰³ Ruling in favor of Bowers, the Eleventh Circuit reasoned that:

¹⁹³ *Id.* at 487.

¹⁹⁴ 730 F.2d 444 (6th Cir. 1984).

¹⁹⁵ *Id.* at 449. *Rowland* relied on the Supreme Court's *Connick v. Myers* decision, which held that:

when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. 461 U.S. 138, 147 (1983).

¹⁹⁶ See *Rowland*, 730 F.2d at 446.

¹⁹⁷ *Id.* at 449.

¹⁹⁸ See *Rowland v. Mad River Local Sch. Dist.*, 470 U.S.

1009, 1012 (1985) (Brennan, J., dissenting) *denying cert. to* 730 F.2d 444 (6th Cir. 1984). See also José Gómez, *The Public Expression of Lesbian/Gay Personhood as Protected Speech*, 1 L. & INEQ. J. 121 (1983) (arguing that the expression of lesbian/gay "personhood," whether in public or private, is entitled to constitutional protection and that social pressure on gay men and lesbians to closet their sexual orientation and physical manifestations thereof, is tantamount to impermissible forced expression under First Amendment analysis).

¹⁹⁹ 114 F.3d 1097 (11th Cir. 1997), *cert. denied*, 66 U.S.L.W. 3338 (Jan. 12, 1998).

²⁰⁰ *Id.* at 1100.

²⁰¹ *Id.* at 1104.

²⁰² *Id.* at 1108.

²⁰³ *Id.* at 1105.

[G]overnment employees who have access to their employers' confidences or who act as spokespersons for their employers, as well as those employees with some policy-making role, are in a special class of employees and might seldom prevail under the First Amendment in keeping their jobs when they conflict with their employers.²⁰⁴

The four dissenting judges faulted the majority for ignoring the *Romer* decision. Arguing that although the *Pickering* balancing test is the right measure for reviewing government employment actions implicating the First Amendment, the dissenters reasoned that "[w]ith *Romer* in the balance, the scales tip decidedly in favor of Shahrar because Bowers' asserted interests are not a legitimate basis for infringing Shahrar's constitutionally-protected right of intimate association."²⁰⁵ The dissenters found that the Attorney General's justifications were all based on "animosity toward homosexuals" as a class, which *Romer* held not to be a rational basis for state action.²⁰⁶

Although *Shahrar* calls into question the out-of-workplace first amendment rights of lesbian and gay public employees, its impact on the right of lesbian and gay public schoolteachers may be limited. The state's justification in *Shahrar*—that the nature of Shahrar's job required her expression and conduct both on and off the job to be consistent with the Attorney General's political positions—is not analogous to the case of teachers. Unlike junior attorneys in attorney general offices, public schoolteachers are not in "policy-making roles" that require them to "act as spokespersons for their employers." In addition, it is unlikely that the out-of-school same-sex marriage of a public schoolteacher would disrupt school activities to the same degree that Bowers claimed such a marriage ceremony would disrupt the activities of his office.

e. *Prohibitions Against Same-Sex PDAs Fail Under First Amendment Scrutiny*

Because same-sex PDAs may be protectible ex-

pression, government attempts to restrict such expression—such as a prohibition on same-sex PDAs by teachers—likely would invoke the First Amendment's freedom of expression guarantee. Like Aaron Fricke's desire to attend the prom with his same-sex date, a gay or lesbian schoolteacher's out-of-classroom public displays of affection (i.e., hand-holding, kissing, and hugging) may count as significantly expressive symbolic speech. In his concurrence to *Barnes v. Glen Theatre*,²⁰⁷ in which the Supreme Court found that public nude dancing qualifies as "expressive conduct," Justice Antonin Scalia defined "inherently expressive conduct" as conduct "that is normally engaged in for the purpose of communicating an idea, or perhaps an emotion, to someone else."²⁰⁸ Clearly, "hold[ing] hands, walk[ing] arm in arm . . . and engaging in some kissing,"²⁰⁹ what was described during the Senate's ENDA debate as PDAs, are acts which are "normally engaged in for the purpose of communicating. . . . an emotion. . . . to someone else."²¹⁰

In reviewing a government action that interferes with freedom of expression, it is first necessary to determine the impetus of the action. If the regulation of the conduct is not directly related to the expressive aspects or the content of the activity and is therefore "content-neutral," the *O'Brien* test is applied. As noted above, the *Fricke* court opted to apply this content-neutral analysis, reasoning that it was not the content of Aaron's expression, but the threat of violence associated with allowing Aaron to bring his same-sex date that was the justification for restricting Aaron's expression.²¹¹

If, however, the regulation is directed at restricting the content of the expression itself the regulation is deemed "content-based," must be treated as if it restricted the expression itself, and must be subjected to First Amendment strict scrutiny.²¹² For example, the Supreme Court found in *Texas v. Johnson*²¹³ that Texas's overarching in-

judgment).

²¹¹ Fricke, 491 F.Supp. at 385.

²¹² See Cole & Eskridge, *supra* note 179, at 331; John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1497-98 (1975).

²¹³ 491 U.S. 397, 406 (1989) (finding that the act of burning the American flag is expressive conduct protected by the First Amendment).

²⁰⁴ *Id.* at 1103 (citing *Bates v. Hunt*, 3 F.3d 374, 378 (11th Cir. 1993)); See *Sims v. Metropolitan Dade County*, 972 F.2d 1230, 1237-38 (11th Cir. 1992).

²⁰⁵ *Shahrar*, 114 F.3d at 1126 (Birch, Cir. J., dissenting).

²⁰⁶ *Id.* at 1126-27 (citing *Romer*, 116 S. Ct. at 1628).

²⁰⁷ 501 U.S. 560 (1991).

²⁰⁸ *Id.* at 577 n.4 (Scalia, J., concurring in the judgment).

²⁰⁹ 142 CONG. REC. S9986, S9993 (daily ed. Sept. 6, 1996) (Statement of Sen. Hatch).

²¹⁰ *Barnes*, 501 U.S. 577 n.4 (Scalia, J. concurring in the

terest in attempting to outlaw flag-burning was in suppressing the message associated with the flag-burning.²¹⁴ Under strict First Amendment review of content-based regulations, the regulation will be sustained only if it (1) serves a compelling state objective, and (2) is drawn as narrowly as possible to achieve that objective.²¹⁵

Consequently, if a school board were to "take action against" a teacher for engaging in same-sex PDAs during non-school hours, such actions likely would constitute a violation of the teacher's freedom of expression. Such actions clearly would be content-based, given that the actions are targeted directly at the expression (i.e. same-sex affection) and not an objective unrelated to the expression. That objective, which is based solely on social prejudice against and discomfort with homosexuality, is illegitimate.

Even if the strict free speech scrutiny applied to content-based government actions did not apply to a proscription of same-sex PDAs, it very likely would be invalidated under *O'Brien* relaxed scrutiny. Perpetuating homophobia is not an "important or substantial government interest," and thus a ban on same-sex PDAs would fail the *O'Brien* test.

f. *Applying the Schoolteacher Speech Cases*

Because our discussion of same-sex PDAs in this instance involves teachers, a straightforward First Amendment inquiry is inadequate to determine whether a limitation on such expressive conduct would be constitutionally permissible. Whether the same-sex PDAs take place on or away from school grounds may determine which line of schoolteacher speech cases would apply.

g. *Same-Sex Out-of-Classroom PDAs are Protectible Speech Under Pickering Test*

The arguments made on the Senate floor against ENDA concerning same-sex PDAs suggest that the concern is not so much the same-sex PDAs of teachers in public settings away from the school itself but, more importantly, the displays of same-sex affection in view of schoolchildren, involving a schoolteacher outside of the school building, for example, when the schoolteacher is dropped-off at work in the morning or is picked-up after the schoolday is over. These PDAs should be treated as protected speech under the *Pickering* test.

As discussed above, school authorities do not have the power to control the out-of-classroom speech of public schoolteachers that concerns controversial matters of public importance and that does not harm or disrupt the school's ability to operate efficiently or inhibit the teacher's ability or fitness to carry out his or her teaching duties. Like Aaron Fricke's decision to take a same-sex date to his prom, which the court described as a political statement, a schoolteacher's same-sex PDA may have politically expressive value.²¹⁶

Moreover, it is highly unlikely that a gay or lesbian schoolteacher's out-of-school same-sex PDAs would in any way harm or disrupt the school's operations or hamper the teacher's teaching abilities. Like the teacher in *Acanfora*, whose acknowledgment of his homosexuality to the press was deemed insufficient grounds for termination, teachers who engage in same-sex PDAs similarly are not disrupting school operations or impeding their effectiveness as teachers by engaging in such PDAs.²¹⁷ Even if out-of-school same-sex PDAs did

²¹⁴ See *id.*

²¹⁵ See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981) (holding that a state university violated First Amendment by refusing to allow student religious groups to meet anywhere on campus, although non-religious student groups were accorded that privilege); *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 515 (1981) (holding a San Diego ordinance prohibiting all billboards containing non-commercial messages except for certain categories (e.g., political campaign signs, time, and temperature signs) unconstitutional given that "[t]he city may not choose the appropriate subjects for public discourse"). First Amendment protection, however, is not accorded to "unprotected" categories of expression, which include defamation, advocacy of imminent lawless behavior, "fighting words," and obscenity. See *TRIBE*, *supra* note 89, §§ 12-12 to 12-13, at 861-86 (defamation), § 12-19, at 841-49 (lawless action), § 12-10, at 849-56 ("fight-

ing words"), and § 12-16, at 904-19 (obscenity).

²¹⁶ See *Fricke*, 491 F. Supp. at 385. Even if same-sex PDAs were deemed not to express a political message or were non-public, however, such PDAs should still be entitled to First Amendment protection. See EDITORS OF HARVARD LAW REVIEW, *SEXUAL ORIENTATION AND THE LAW* 77 n.23, 77 (1990) (noting that the First Amendment protects political as well as non-political speech. "In the context of sexual orientation, social activity can both contribute to political debate and provide independent value and self-fulfillment to the speaker.") and (analogizing to civil rights era, where "the political movement for equal rights frequently took the form of demands for equal treatment of individual citizens in social settings.").

²¹⁷ See National Gay Task Force v. Board of Educ., 729 F.2d 1270 (10th Cir. 1984), *aff'd* 470 U.S. 903 (1985) (*per curiam*) (invalidating as unconstitutional state law permitting punishment for "public homosexual conduct," which in-

have some negative effects on school operations or teaching effectiveness, such effects most likely would have been caused by societal prejudice against lesbians and gay men, an impetus for discrimination deemed illegitimate by *Romer*.

2. In-Classroom PDAs

There is little question that most PDAs between teachers and their significant others in the school building and in public view may not be appropriate, regardless of sexual orientation. As explained in the following section, what is most important with respect to restrictions on in-school PDAs is that they be equally applied to both straight and gay teachers. Placing restrictions on displays of same-sex affection, while permitting heterosexual PDAs, very likely would be unconstitutional. Moreover, as is the case with "proselytization," it is highly unlikely that lesbian and gay schoolteachers would risk their jobs or their educational effectiveness in order to engage in same-sex PDAs during school hours, inside the school building. It is conceivable that like most heterosexual teachers, lesbian and gay teachers prefer to keep their family life private in the course of carrying out their teaching duties so as to not detract from their educational mission. As the district court decision in *Acanfora* recognized, "to some extent every teacher has to go out of his way to hide his private life. . . ." ²¹⁸

a. Prohibitions Against Same-Sex PDAs Also Fail Under Equal Protection Scrutiny

"Taking action" against teachers for out-of-classroom same-sex PDAs, when no disciplinary action is taken against heterosexual PDAs, not only

would violate the First Amendment, but also would be a clear violation of the Fourteenth Amendment's equal protection guarantee. Moreover, because such a discriminatory classification is based on a fundamental right, i.e. symbolic expression (same-sex PDAs), the classification is subject to strict scrutiny, regardless of whether the class discriminated against is a designated "suspect class."²¹⁹ Typically, a government classification is required only to bear a rational relationship to a legitimate public purpose, but that where the classification "encompasses a suspect class or burdens a fundamental right . . . the government [is] held to a stricter standard of justification."²²⁰

Under strict first amendment scrutiny, the classification in question is upheld only if it is "necessary" to promote a "compelling" government interest.²²¹ There is no valid, nevermind compelling, government interest in singling out gay and lesbian teachers for discrimination solely to advance obsolete and vague notions of morality and what constitutes a "good role model."

Moreover, given society's gradually increasing understanding and acceptance of gay people, it is highly unlikely that the out-of-classroom same-sex PDAs feared by certain Senators (i.e., hugging, holding hands, etc.) would cause even the slightest disruption in school order or in the teacher's effectiveness in the classroom. As the Supreme Court made clear in *Tinker v. Des Moines Independent Community School District*,²²² mere "discomfort and unpleasantness" are insufficient disruptions to overcome the right to freedom of expression.²²³ An attempt to accommodate or cater to the prejudices and discomfort of heterosexuals toward gay people, by definition, cannot be a legitimate state interest.²²⁴ And as the Court said in

cluded "advocacy.").

²¹⁸ *Acanfora*, 359 F. Supp. at 856.

²¹⁹ See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985); *Plyler v. Doe*, 457 U.S. 202, 217 n.15 (1982).

²²⁰ *Fricke*, 491 F. Supp. at 381, 388 n.6 (citing *Police Dep't v. Mosley*, 408 U.S. 92, 99 (1972), where the Supreme Court invalidated an ordinance prohibiting picketing because it singled out labor picketing only and thus violated the principle of neutral treatment of similarly situated speakers ("Because picketing plainly involves expressive conduct within the protection of the First Amendment, discriminations among pickets must be tailored to serve a substantial governmental interest."); see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (citations omitted) (invalidating ordinance banning cross burning because the ordinance did not

treat all symbolic "fighting words" equally, but selectively prohibited those based on race, color, creed, religion or gender: "[t]he First Amendment generally prevents government from proscribing speech or even expressive conduct because of disapproval of the ideas expressed.").

²²¹ See *Mosley*, 408 U.S. at 95; see also *TRIBE*, *supra* note 89, § 16-9, at 1459.

²²² 393 U.S. 503 (1969).

²²³ *Id.* at 509.

²²⁴ See *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); see also *Cleburne*, 473 U.S. at 448 ("[M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment

United States Department of Agriculture v. Moreno,²²⁵ "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."²²⁶

In sum, although the Supreme Court has not yet deemed sexual orientation a suspect classification meriting heightened scrutiny, promising language in such recent cases as *Romer* and *Nabozny* confirm that unreasonable distinctions between gay and straight teachers are constitutionally impermissible. As a simple matter of fairness and equity, gay and lesbian teachers should not be disciplined for actions for which heterosexual teachers are not disciplined. The double standard advocated by the Senators opposing ENDA very clearly would do just that, without promoting any valid government interest.

VI. CONCLUSION

Although virtually none of the arguments raised against ENDA during the 1996 Senate floor debates were new, these arguments were strikingly outmoded and in direct conflict with scientific evidence concerning the nature of sexual orientation and with well-settled First and Fourteenth Amendment principles and caselaw. Given the increasing scientific understanding that homosexuality generally is fixed and unchangeable, the claim that lesbian and gay schoolteachers are *de facto* poor role models who are apt to recruit their students to homosexuality lacks any valid basis. Sexual orientation has no impact on a person's ability to be a successful schoolteacher admired by students and adults alike.

Moreover, the presence of lesbian or gay teachers in the schools not only benefits all children by enhancing the overall diversity of school faculty, it benefits lesbian and gay youth in particular. Given the increased propensity of these youths to commit suicide as a result of feeling isolated and ostracized, the existence of lesbian or gay teachers

on the school faculty may make the difference between life or death for many gay and lesbian children.

In addition, the fact that the Supreme Court in its *Romer* decision found that animosity toward gay people is not a legitimate basis for state action also makes it highly unlikely that a school board could refuse to hire lesbian or gay schoolteachers for no other reason than the notion that lesbians and gay men are intrinsically immoral and thus, poor role models for their students. To borrow from Justice Kennedy, this a school administrator cannot do.

Similarly, the notion that ENDA somehow would permit lesbian or gay schoolteachers to proselytize in the classroom is baseless. ENDA's only effect will be to ensure that lesbian and gay employees and candidates are judged by their work performance and not on the basis of their sexual orientation. Consequently, ENDA will not affect longstanding and well-settled precedent according school boards and school administrators expansive jurisdiction over the in-classroom speech of public schoolteachers.

Also, the claim that ENDA would prohibit a school board from disciplining a gay teacher for public displays of affection with a same-sex partner during non-school hours is misplaced. It is the First Amendment's free speech guarantee, and not ENDA, that would protect such PDAs, which very likely may be deemed political or symbolic speech.

Finally, perhaps the most persuasive evidence exposing the invalidity of the alarmist claims raised against ENDA involving schoolteachers is the fact that these claims have not materialized in the states and local jurisdictions with ENDA-like laws securely in place. The protection of lesbian and gay public schoolteachers from discrimination in the workplace on the basis of sexual orientation in many state and local jurisdictions has not engendered the negative consequences predicted by Senators Aschroft and Nickles, among others, in opposing ENDA on a federal level.

houses, multiple dwellings, and the like. . . . [T]he city may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic.").

²²⁵ 413 U.S. 528 (1973).

²²⁶ *Id.* at 534, cited in *Romer*, 116 S. Ct. at 1628; see also *Zobel v. Williams*, 457 U.S. 55, 63 (1982).

